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Sliding Scale Settlements: The Need for a Minimum Contribution to Comply with the Reasonable Range Test for Good Faith

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SLIDING SCALE SETTLEMENTS: THE NEED FOR A MINIMUM CONTRIBUTION TO COMPLY WITH THE REASONABLE RANGE TEST FOR GOOD FAITH

I. INTRODUCTION

The California tort contribution statutes[1] introduced a good faith requirement for pretrial settlements in suits involving multiple tortfeasors. A good faith settlement releases a settling defendant not only from liability to the plaintiff but also from claims for partial indemnity[2] by any co-defendants. The amount of the settlement is then deducted from any judgment levied against the nonsettling defendant or defendants at a trial.[3] Because of its effect on the financial liability of nonsettling parties, the crucial issue becomes how to define a good faith settlement.

California appellate courts have developed competing good faith tests. One, the reasonable range test, focuses on the relationship between the settlement amount and the settling defendant's proportionate share of liability.[4] The tortious conduct test, on the other hand, examines the conduct of the parties in negotiating the agreement.[5] Recently, in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[6] the California Supreme Court decided the issue by enunciating a test for good faith which requires that the agreement be within a "reasonable range" of the settling

1. CAL. CIV. PROC. CODE §§ 875-880 (West 1980 & Supp. 1986). The principle of contribution allows a tortfeasor against whom a judgment is rendered to recover proportional shares of judgment from other joint tortfeasors whose negligence contributed to the injury and who were also liable to the plaintiff. BLACK'S LAW DICTIONARY 297 (5th ed. 1979). *See infra* notes 18-27 and accompanying text.

2. See *infra* notes 35-36 and accompanying text for a discussion of partial indemnity under American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978).

3. CAL. CIV. PROC. CODE § 877 (West 1980).

4. *See* Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984); Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975); River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972). *See infra* text accompanying notes 41-55.

5. Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985) (disapproving cases employing tortious conduct test for good faith similar to test employed by *Stambaugh* court). See *infra* notes 56-62 and accompanying text for a discussion of *Stambaugh*.

6. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

defendant's fair share of potential liability.[7] This standard raises significant issues when the pretrial settlement is a sliding scale agreement[8] because these agreements may enable the settling defendant to escape an action without making any contribution to the damage award. This situation arises when the settling party guarantees the plaintiff a minimum recovery in exchange for an agreement that he will be relieved from liability should the plaintiff recover the guarantee amount or more in a judgment against the remaining defendant. If the minimum guarantee amount has been satisfied, the settling defendant's financial liability is zero.

This Comment addresses three issues with respect to sliding scale settlements and good faith: First, does California Code of Civil Procedure section 877.5, which authorizes the existence of sliding scale settlements, implicitly require that these agreements meet the standards of a good faith settlement? Second, does *Tech-Bilt* mandate that courts employ a reasonable range test rather than a tortious conduct test when determining the good faith of sliding scale settlements? Finally, assuming a reasonable range test is required, what are its components, and how should it be applied by the courts in cases involving sliding scale agreements?

This Comment suggests that the reasonable range test adopted by the California Supreme Court in *Tech-Bilt* must encompass sliding scale settlement agreements. The rationale of *Tech-Bilt* is to protect nonsettling joint tortfeasors from an inequitable shift in liability when a codefendant settles prior to trial. This effect currently exists in sliding scale cases and will continue unless the *Tech-Bilt* rule is extended to those agreements.

This Comment also examines the proper application of the reasonable range test to sliding scale settlements. It will discuss the factors which should be considered in determining the reasonable range of a settling defendant's potential liability in light of several recent California Appellate Court decisions including *Riverside Steel Construction Co. v. William H. Simpson Construction Co.*,[9] *Abbott Ford, Inc. v. Superior Court*,[10] and *City of Los Angeles v. Superior Court*.[11] The author will conclude that in these decisions the courts incorrectly applied the reason-

7. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263.

8. See *infra* notes 73-77 and accompanying text discussing the anatomy of a sliding scale agreement.

9. 171 Cal. App. 3d 781, 217 Cal. Rptr. 569, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985) (opinion to remain published and citable as authority).

10. 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985) (opinion to remain published and citable as authority).

able range test articulated in *Tech-Bilt*, and as a result upheld sliding scale settlements which should have been rejected. Finally, the author will propose a workable method by which counsel can negotiate valid and equitable sliding scale agreements which meet the requirements of a good faith settlement.

II. HISTORICAL BACKGROUND

This section will review the historical development of tort contribution law in California as well as the evolution of the good faith settlement requirement. These general concepts provide the fundamental framework that gives rise to the more specific problems posed by sliding scale settlement agreements.

A. The Development of California Tort Contribution Law

1. Common law

In California, the doctrine of joint and several liability governs the imposition of liability among multiple tortfeasors.[12] Each defendant found to be jointly and severally liable is individually responsible for a plaintiff's entire injury and for 100% of any judgment resulting from that injury. A plaintiff may choose to collect an entire judgment from any one defendant, but is not compelled to collect from all defendants.[13] Absent a mechanism by which a tortfeasor can force other tortfeasors to contribute to the verdict, this system historically led to unfairness where a plaintiff chose to collect the entire judgment from only one of several joint tortfeasors. At early common law, and in the majority of American jurisdictions, courts refused to recognize the right of contribution among joint tortfeasors.[14] The courts reasoned that "the law should deny assistance to tortfeasors in adjusting losses among themselves because they are

11. 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986), *vacating and remanding* 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (1984).

12. American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 590, 578 P.2d 899, 906, 146 Cal. Rptr. 182, 189 (1978). *See also* Fleming, *Report to the Joint Committee of the California Legislature on Tort Liability on the Problems Associated with* American Motorcycle Association v. Superior Court, 30 HASTINGS L.J. 1465, 1482-85 (1979); Comment, *Joint Torts and Several Liability*, 25 CALIF. L. REV. 413 (1937).

13. Balding v. Stutsman, Inc., 246 Cal. App. 2d 559, 562, 54 Cal. Rptr. 717, 719 (1966) (holding that a plaintiff should be able to control his case by proceeding against the party or parties he determines are most clearly liable).

14. Thornton v. Luce, 209 Cal. App. 2d 542, 550, 26 Cal. Rptr. 393, 398 (1962) (reiterating common law rule that one tortfeasor could not obtain contribution from another); *see generally* Comment, *Contribution and Indemnity Collide with Comparative Negligence—The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779 (1978).

wrongdoers and the law should not aid wrongdoers."[15] As a result, a plaintiff could recover for his injury from one defendant although there were other, equally culpable defendants. The defendant from whom the plaintiff recovered, however, had no recourse against the nonpaying co-tortfeasors.[16] California adopted and followed this rule until 1957.[17]

2. Statutory developments

In an effort to alleviate the harshness of the common law rule, the California Legislature, in 1957, enacted a series of reforms known as the tort contribution statutes.[18] California Code of Civil Procedure section 875 established a right of contribution among two or more tortfeasors where a money judgment had been rendered jointly against them.[19] A defendant could exercise this right only after paying the entire judgment or more than his pro rata share.[20] He was then entitled to contribution from his co-defendant for any payment made in excess of his pro rata share.[21]

Although these statutes codified the right to contribution, they were initially of limited value. In order for there to be a right of contribution there had to be a joint judgment.[22] By suing only one tortfeasor, or less

15. River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 993 n.5, 103 Cal. Rptr. 498, 503 n.5 (1972).

16. Adams v. White Bus Line, 184 Cal. 710, 712-13, 195 P. 389, 389-90 (1921) (adopting generally accepted rule that there is no right to contribution between joint tortfeasors). A general exception to this rule might occur as a result of contract or equitable considerations. City of San Francisco v. Ho Sing, 51 Cal. 2d 127, 130, 330 P.2d 802, 803-04 (1958).

17. Augustus v. Bean, 56 Cal. 2d 270, 271, 363 P.2d 873, 874, 14 Cal. Rptr. 641, 642 (1961) (stating that prior to enactment of contribution statutes one tortfeasor could not obtain contribution from another); Adams v. White Bus Line, 184 Cal. 710, 712-13, 195 P. 389, 389 (1921). Dean Prosser said of this rule, "[t]here is obvious lack of sense and justice in a rule which permits the entire burden of a loss, for which two defendants were equally, unintentionally responsible, to be shouldered onto one alone, according to the . . . plaintiff's whim or spite, or the plaintiff's collusion with the wrongdoer. . . ." W. PROSSER & R. KEETON, HANDBOOK OF THE LAW OF TORTS § 50, at 337-38 (5th ed. 1984).

18. CAL. CIV. PROC. CODE §§ 875-880 (West 1980).

19. CAL. CIV. PROC. CODE § 875(a) (West 1980). *See* E. B. Wills Co. v. Superior Court, 56 Cal. App. 3d 650, 653, 128 Cal. Rptr. 541, 543 (1976) (explaining rule that right to contribution does not arise unless joint judgment has been entered and one defendant has discharged judgment or paid more than his pro rata share).

20. CAL. CIV. PROC. CODE § 875(c) (West 1980). *See* E. B. Wills Co. v. Superior Court, 56 Cal. App. 3d 650, 653, 128 Cal. Rptr. 541, 543 (1976). A pro rata share is determined by dividing the total judgment by the number of tortfeasors, excluding those who are insolvent or could not be made parties to the action, and then assigning such pro rata share to each joint tortfeasor. Wesierski, *Mary Carter Agreements and Good Faith Settlements—Are They Both Possible in California?*, 48 INS. COUNS. J. 639, 647 n.26 (1981).

21. CAL. CIV. PROC. CODE § 875(c) (West 1980).

22. *Id.* § 875(a).

than all the tortfeasors, a plaintiff could undermine the contribution right because defendants could only collect contribution from other defendants named in the suit.[23] Accordingly, in certain situations, a defendant still had no right to obtain contribution from an equally liable, but unnamed joint tortfeasor. As will be discussed below, judicial modification and interpretation of these statutes has dramatically improved the situation.[24]

The contribution statutes also introduced the concept of a good faith settlement. Under these provisions, a settlement made prior to trial discharged the settling defendant "from all liability for any contribution to any other tortfeasors," provided that the settlement was made in good faith.[25] Further, the statute provided that any verdict rendered against the remaining defendants would be reduced by the amount of the good faith settlement.[26] Because the statute did not define the concept specifically, the "good faith" controversy was born.[27]

3. Case law

The California Supreme Court in effect modified the meaning and scope of the contribution laws in several key decisions, including *Li v. Yellow Cab Co.*[28] and *American Motorcycle Association v. Superior Court.*[29] In *Li*, the court imposed a system of pure comparative negligence whereby damages are apportioned on the basis of percentage of

23. Thus, if *A*, *B* and *C* were jointly and severally liable for *D*'s injury and *D* sued only *B*, *B* could not sue *A* and *C* for contribution because a judgment had not been rendered against them. *See* General Elec. Co. v. State *ex rel.* Dep't of Pub. Works, 32 Cal. App. 3d 918, 925-26, 108 Cal. Rptr. 543, 547-48 (1973); Fleming, *supra* note 12, at 1487-88. An example of a situation where a plaintiff might not want to name all potentially liable defendants occurred in American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). In that case, two of the potential defendants were the plaintiff's parents. By not naming them in the complaint, the plaintiff attempted to shield his parents from a claim for contribution. *Id.* at 585, 578 P.2d at 903, 146 Cal. Rptr. at 186.

24. See *infra* notes 35-36 and accompanying text for a discussion of American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), and the concept of partial indemnity.

25. CAL. CIV. PROC. CODE § 877(b) (West 1980). Under the common law, a settlement with one joint tortfeasor generally acted to release all other joint tortfeasors from liability for the injury. *See* Havighurst, *The Effect of a Settlement with One Co-Obligor upon the Obligations of the Others*, 45 CORNELL L.Q. 1 (1959).

26. CAL. CIV. PROC. CODE § 877(a) (West 1980).

27. See *infra* note 38 for a discussion of the issues involved in a good faith determination.

28. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

29. 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978). For a discussion of the effects of *Li* and *American Motorcycle* on tort contribution law, see Comment, *Comparative Negligence, Multiple Parties, and Settlements*, 65 CALIF. L. REV. 1264 (1977); Comment, *Contribution and Indemnity Collide with Comparative Negligence—The New Doctrine of Equitable Indemnity*, 18 SANTA CLARA L. REV. 779 (1978).

fault.[30] For example, if a plaintiff suffered damages of $100,000 and the jury determined that the plaintiff and defendant were both fifty percent at fault, the plaintiff would recover only $50,000 from that defendant.

The rule announced in *Li* apparently contradicted the California contribution statutes. Because the statutes allowed a claim for contribution only among parties named in a suit, one defendant could be held liable for the entire judgment even though there were other equally liable parties. In such a situation, the defendant will pay more than his degree of fault compels, in direct conflict with the policy announced in *Li*.[31]

In addition, the California contribution statutes provided for a pro rata allocation of damages when a contribution claim was allowed,[32] requiring that damages be equally divided among the joint tortfeasors. This aspect of the statute also contradicted the policy of apportioning damages based on percentage of fault set forth in *Li*.[33] Both of these inconsistencies were subsequently addressed and reconciled by the California Supreme Court in *American Motorcycle*.[34]

In *American Motorcycle*, the court employed the concept of partial indemnity to expand the contribution rights of joint tortfeasors. The court defined the term partial indemnity as the right of one tortfeasor, who had paid more than his allocable share of damages, to recover the excess from the other joint tortfeasors.[35] A partial indemnity claim could be stated by way of a cross-complaint against a co-defendant

30. *Li*, 13 Cal. 3d at 828-29, 532 P.2d at 1243, 119 Cal. Rptr. at 875. The court stated, "we conclude that the 'all-or-nothing' rule of contributory negligence . . . is herewith superseded by a system of 'pure' comparative negligence, the fundamental purpose of which shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of each of the parties." *Id.*

31. For a discussion of comparative negligence and its inconsistency with the California contribution statutes, see Schwartz, Li v. Yellow Cab Co.: *A Survey of California Practice Under Comparative Negligence*, 7 PAC. L.J. 747 (1976). This issue is discussed in Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976); *see infra* notes 56-62 and accompanying text. In *Stambaugh*, the nonsettling defendant asserted that when one defendant is allowed to settle in good faith for an amount which is disproportionately low in respect to his degree of fault, the other defendants are required to pay an amount which exceeds that compelled by their degree of fault. The nonsettling defendant contended that this result violated the *Li* court's policy of comparative negligence in which damages are apportioned in proportion to fault. *Id.* at 234-35, 132 Cal. Rptr. at 845-46. The *Stambaugh* court, although recognizing the validity of this contention, rejected the notion that *Li* was intended to modify Code of Civil Procedure § 877. The court held that the policy of encouraging settlement, which was central to that code section, would be frustrated by requiring settlements which were proportionate to the settling party's degree of fault. *Id.* at 235-36, 132 Cal. Rptr. at 846.

32. CAL. CIV. PROC. CODE § 875(c) (West 1980).

33. *See* Schwartz, *supra* note 31, at 765.

34. See *infra* notes 35-36 and accompanying text for discussion of *American Motorcycle*.

35. 20 Cal. 3d at 607, 578 P.2d at 917, 146 Cal. Rptr. at 200.

whether or not he had been named as a defendant in the action.[36] *American Motorcycle*, therefore, modified the plaintiff's ability to control the named defendants' right to contribution by failing to name all the possible defendants.

The contribution statutes and the judicial decisions that followed alleviated much of the historical inequity that existed when one joint tortfeasor was required to pay an entire judgment despite the existence of potentially viable co-defendants. At the same time, these developments placed new emphasis on settlements and in turn on the requirement of good faith. Only by entering into a "good faith" settlement with the plaintiff could a tortfeasor insulate himself from claims for partial indemnity.[37] Thus, the definition of good faith determines the extent to which a defendant may use the contribution statutes to avoid the harshness of the common law.[38]

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36. In *American Motorcycle*, a young boy was injured in a cross-country motorcycle race. The boy sued AMA (the sponsor of the race) and AMA cross-claimed against the boy's parents for contribution. The trial court denied the motion because the parents were not named defendants in the suit as required by California Code of Civil Procedure § 875. The supreme court reversed, allowing the impleading despite the dictates of the Code. *Id.* at 605-07, 578 P.2d at 916-18, 146 Cal. Rptr. 199-201. The creation of the concept of partial indemnity, which allows joint tortfeasors to apportion liability on the basis of comparative fault, superseded the method of sharing established by the contribution statutes. "In effect, the court read [the contribution statutes] out of the statute book . . . ." Fleming, *supra* note 12, at 1487. This is because partial indemnity did away with the statutory requirements that a joint judgment be rendered prior to "contribution" and that one defendant had paid the entire judgment or more than his pro rata share. *Id.*

37. CAL. CIV. PROC. CODE § 877 (West 1980); *see infra* notes 25-26.

38. The above point is best illustrated by an example. If two defendants, *X* and *Y*, are found to be jointly and severally liable, a plaintiff may collect the judgment from the defendant of his choosing. If the plaintiff wins a judgment against both *X* and *Y* and decides to collect it from *Y*, under the common law *Y* would be forced to pay the entire award with no recourse against *X*. Under the contribution statutes, *Y* could sue *X* for contribution provided that the plaintiff named *X* as a defendant and the court rendered a joint judgment. After the expansion of the contribution rules in *American Motorcycle*, *Y* could file a cross-claim for indemnity whether or not *X* was a named defendant in the original suit.

The good faith settlement rules add another element. If *X* and *Y* are each 50% liable to the plaintiff, and *X* enters into a pretrial settlement with the plaintiff, this settlement insulates *X* from any claims for contribution or partial indemnity by *Y*, provided the agreement is entered into in good faith. *X*'s settlement is then deducted from the final damage award. *Y* will pay only the verdict minus *X*'s settlement price. If, however, *X* paid only $10.00 for his settlement and the ultimate judgment equalled $25,000, *Y* would have to pay the remaining $24,990 even though both were 50% at fault.

If a court approved the above settlement as made in good faith, *Y* would not be able to obtain partial indemnity from *X*. This outcome offends the policy articulated in *American Motorcycle*, which expanded a tortfeasor's ability to allocate damages based on fault. The judicial interpretation of good faith and its scope is the primary means of preventing such a potentially unfair result.

B. The Evolution of Good Faith

In interpreting section 877 of the California Code of Civil Procedure, courts have developed competing definitions of good faith. The first courts to address the issue appeared to adopt a test which required settlements to be within a reasonable range of the settling party's fair share of liability.[39] Subsequently, however, courts developed the "tortious conduct test," which focused on the conduct of the parties in negotiating the settlement.[40] The mechanics and application of these conflicting approaches and the policy considerations behind each are discussed below.

1. The reasonable range test

The reasonable range test for good faith requires that the settlement amount reasonably reflect the portion of damages the settling party would have been liable for had he remained in the action. This standard was first articulated in *River Garden Farms, Inc. v. Superior Court.*[41] In that case, the California court of appeal faced a challenge to the good faith of a pretrial settlement between the plaintiffs and all but one of several joint tortfeasors. The plaintiffs were two minor children seriously injured in a fire which also killed their parents. The children settled their own personal injury claims as well as their claims for the wrongful death of their parents.[42] The settlement agreement allocated most of the proceeds to the wrongful death claims. The nonsettling defendant contested this allocation, arguing that since the personal injury claims were likely to draw significantly larger verdicts at trial, the bulk of the settlement funds should be allocated to those claims.[43] The allocation was important because the amount allocated to each claim would be deducted from

39. See *infra* notes 41-55 and accompanying text for a discussion of the cases establishing the "reasonable range test." This standard protects the nonsettling party from paying a disproportionate share of the award. Since the good faith settlement amount is deducted from the ultimate judgment, if that settlement reasonably reflects the settling party's liability, the nonsettlor is not unduly prejudiced by losing his right to partial indemnity. *See* Roberts, *The "Good Faith" Settlement: An Accommodation of Competing Goals*, 17 LOY. L.A.L. REV. 841, 930-31 (1984).

40. See *infra* notes 56-63 and accompanying text for a discussion of cases establishing the tortious conduct test.

41. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

42. *Id.* at 991, 103 Cal. Rptr. at 501-02. The childrens' personal injury claims were very valuable because they suffered serious bodily injury including permanent physical handicaps. The claims for wrongful death were less valuable because there was a question of contributory negligence on the part of the parents. *Id.* at 991, 103 Cal. Rptr. at 502.

43. *Id.* at 991, 103 Cal. Rptr. at 502. The nonsettling defendant contended that the allocation of the disproportionately large share of the settlement funds to the less valuable wrongful death claims isolated it as the sole target for a potentially large personal injury judgment which

the judgment awarded by the jury with respect to that claim. Therefore, the nonsettling defendant would benefit if most of the settlement proceeds were credited toward the claim likely to draw the larger award.

Although the court did not specifically decide the issue of good faith,[44] its analysis of the good faith requirement became the basis for future decisions. The court reasoned that, "[a]lthough many kinds of collusive injury are possible, the most obvious and frequent is that created by an unreasonably cheap settlement."[45] Furthermore, the court stated that "[t]he price of a settlement is the prime badge of its good or bad faith."[46] Interpreting the policy goals behind the 1957 tort contribution legislation, the *River Garden Farms* court suggested that a good faith settlement must bear some relation to the settling defendant's fair share of potential liability. According to the court, the two main policies behind the statutes were "first, equitable sharing of costs among the parties at fault, and second, encouragement of settlements."[47] The policy of equitable sharing of costs was satisfied only by a good faith analysis which considered the price of the settlement.

In a subsequent case approving the *River Garden Farms* reasonable range language, the court considered similar issues concerning the allocation of settlement funds between a plaintiff's personal injury and wrongful death claims.[48] Although the trial court in *Lareau v. Southern Pacific Transportation Co.*[49] estimated the plaintiff's wrongful death claim to be

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it would pay without any right to contribution and with credit for only the small amount of the settlement funds allocated to those claims. *Id.* at 992, 103 Cal. Rptr. at 502.

44. The court decided this issue should be litigated within the framework of the claimants' tort suit. *Id.* at 1002, 103 Cal. Rptr. at 509.

45. *Id.* at 996, 103 Cal. Rptr. at 505.

46. *Id.*

47. *Id.* at 993 & n.5, 103 Cal. Rptr. at 503 & n.5.

48. Lareau v. Southern Pac. Transp. Co., 44 Cal. App. 3d 783, 792-99, 118 Cal. Rptr. 837, 842-47 (1975).

49. 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975). For other California cases adopting a reasonable range analysis for the good faith of a settlement, see Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985); Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 824 (1984) (discussing good faith of sliding scale settlement). For a Ninth Circuit opinion appearing to favor a reasonable range analysis rather than a tortious conduct test, see Commercial Union Ins. Co. v. Ford Motor Co., 640 F.2d 210 (9th Cir.), *cert. denied*, 454 U.S. 858 (1981). In *Commercial Union*, the plaintiffs sued Ford Motor Company and a Ford dealership for personal injuries. The plaintiff dismissed Ford Motor Company because he felt he had a better chance at trial if Ford were not a defendant. The plaintiff reasoned that Ford would retain sophisticated counsel and expert witnesses. *Id.* at 211. A verdict was entered against the dealership. Its insurance company, Commercial Union, sued Ford Motor Company for partial indemnity. *Id.* at 212. Ford claimed that the dismissal was in good faith and thus insulated it from claims for partial indemnity. *Id.*

The Ninth Circuit held that the dismissal was not in good faith. *Id.* at 214. It is not quite

worth no more than $50,000, $94,000 of the settlement was apportioned to that claim.[50] The court of appeal, although remanding the good faith issue to the trial court, embraced the reasonable range directive of *River Garden Farms*, concluding that a definition of good faith must address the goal of equitable apportionment of costs as well as that of encouraging settlements.[51]

It was not until *Torres v. Union Pacific Railroad Co.*,[52] more than nine years after *Lareau*, that a California appellate court again employed the reasonable range analysis as the test for good faith. In *Torres*, the plaintiff was injured on his employer's premises while using his employer's jack to change a tire on his own car. The plaintiff sued both his employer and the manufacturer/distributor of the jack. Prior to trial, the plaintiff and his employer entered into a sliding scale settlement whereby the settling defendant advanced Torres $200,000. Under the agreement, the plaintiff was to repay the settling defendant up to $150,000 depending on his recovery from the manufacturer/distributor. The key element in the agreement was that the settling defendant contributed $50,000 to the plaintiff's recovery regardless of the outcome of the litigation against the remaining defendant.[53]

The *Torres* court approved the sliding scale agreement as a settlement in good faith using a test similar to the one employed in *River Garden Farms*. In rejecting the tortious conduct test, the *Torres* court stated that "[h]ad the Legislature desired to approve all nontortious settlements, it would merely have required that the settlements be 'lawful'; instead, it required that they be in 'good faith.' Some intent must be accorded to the Legislature's choice of this more rigorous term."[54] To be in good faith, the court held, a defendant's settlement figure "must not be grossly disproportionate to what a reasonable person, at the time of the

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clear if the court based its decision on the fact that Ford had not contributed anything to obtain the dismissal or if it focused on and rejected the tactical maneuver involved. The court hinted that proportionality was a factor in its decision by stating that it was bound by the dual goals of equity and settlement, neither of which should be applied to defeat the other. *Id.* at 213-14.

50. *Lareau*, 44 Cal. App. 3d at 797, 118 Cal. Rptr. at 846.

51. *Id.* at 794-97, 118 Cal. Rptr. at 844-46.

52. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

53. *Id.* at 502-03, 203 Cal. Rptr. at 827-28. This $50,000 figure is important because under the California statutes if the settlement is determined to be in good faith, it will be deducted from the ultimate judgment rendered against the nonsettling defendant. CAL. CIV. PROC. CODE § 877 (West 1980). The fact that the $50,000 will be deducted from the ultimate award helps to justify the other effect of the settlement—cutting off the nonsettling party's right to partial indemnity against the settling defendant. See *supra* notes 35-36 and accompanying text for a discussion of partial indemnity.

54. *Torres*, 157 Cal. App. 3d at 507, 203 Cal. Rptr. at 831.

settlement, would estimate the settling defendant's liability to be."[55]

2. The tortious conduct test

Prior to *Torres*, California courts routinely rejected the principles articulated in *River Garden Farms* and developed a new test for the good faith of pretrial settlements. The appellate decision establishing this alternative test, *Stambaugh v. Superior Court*,[56] involved an action for wrongful death resulting from an automobile accident.[57] In *Stambaugh*, the plaintiffs settled with one of several joint tortfeasors for $25,000, the amount of the settling defendant's (Stambaugh's) liability insurance.[58] Another defendant challenged the good faith of this settlement, questioning whether a $25,000 contribution by Stambaugh was sufficient to release him from liability under the comparative negligence rule announced in *Li v. Yellow Cab Co.*[59] In approving the settlement, the *Stambaugh* court declared: "Except in rare cases of collusion or bad faith . . . a joint tortfeasor should be permitted to negotiate settlement of an adverse claim according to his own best interests . . . . His good faith will *not* be determined by the proportion his settlement bears to the damages of the claimant."[60] Thus, *Stambaugh* and its progeny[61] determined

55. *Id.* at 509, 203 Cal. Rptr. at 832.

56. 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

57. *Id.* at 234, 132 Cal. Rptr. at 845.

58. *Id.*

59. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). See *supra* notes 30-33 and accompanying text for a discussion of *Li* and the doctrine of comparative negligence.

60. 62 Cal. App. 3d at 238, 132 Cal. Rptr. at 847-48 (emphasis added). It is difficult to tell exactly what type of collusive behavior constitutes bad faith. However, one court stated that an agreement between the settling party and plaintiffs, whereby the settling party agrees to aid plaintiff's case by committing perjury, would be such a collusive agreement. Dompeling v. Superior Court, 117 Cal. App. 3d 798, 810 n.7, 173 Cal. Rptr. 38, 45 n.7 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

61. The following cases, which adopted a tortious conduct test similar to the one outlined in *Stambaugh*, were expressly disapproved in Tech-bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985): Burlington N. R.R. v. Superior Court, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982); Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981); Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981). The *Tech-Bilt* court, in disapproving *Dompeling* and its "progeny," impliedly disapproved the following cases which also employed a tortious conduct standard: Anderson v. International Harvester Co., 165 Cal. App. 3d 100, 211 Cal. Rptr. 253 (1985) (opinion withdrawn by order of the court); Imperial Spa, Inc. v. Superior Court, 205 Cal. Rptr. 337 (1984) (ordered depublished); Ford Motor Co. v. Schultz, 147 Cal. App. 3d 941, 195 Cal. Rptr. 470 (1983); Kohn v. Superior Court, 142 Cal. App. 3d 323, 191 Cal. Rptr. 78 (1983); Wysong & Miles Co. v. Western Indus. Movers, 143 Cal. App.

the good faith of a settlement by evaluating the motivations behind the negotiations, without regard to the settlement price.[62] Most courts adopted the tortious conduct test and did so not for its fairness,[63] but because of their belief that the primary policy underlying the good faith statutes was to encourage settlement of litigation.

3. *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*

Recently, the California Supreme Court rendered its first decision defining good faith and resolving the conflict discussed above. In *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[64] the court rejected the tortious conduct test enunciated in *Stambaugh* in favor of a good faith analysis similar to the one employed in *River Garden Farms*.[65] The *Tech-Bilt* court stated that "a more appropriate definition of 'good faith' . . . would enable the trial court to inquire, among other things, whether the amount of the settlement is within *the reasonable range* of the settling tortfeasor's proportionate share of comparative liability for the plaintiff's injuries."[66]

In *Tech-Bilt*, the plaintiffs agreed to dismiss their claims against one defendant in return for the latter's agreement to waive any claims against the plaintiffs for costs incurred in defending the lawsuit.[67] The lower court, using the tortious conduct approach, approved the settlement after a good faith hearing.[68] The supreme court reversed, reasoning that the California Legislature could not have intended a tortious conduct test as the standard for good faith.[69] The court explained that with the enact-

3d 278, 191 Cal. Rptr. 671 (1983); Young v. Lane Realty, 158 Cal. Rptr. 71 (1979) (ordered depublished).

62. The *Stambaugh* court defined good faith in a manner which conformed with the strong policy in California to encourage settlement of litigation. *Id.* at 235-36, 132 Cal. Rptr. at 846.

63. *See infra* notes 106 & 227.

64. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

65. *Id.* at 496, 698 P.2d at 164, 213 Cal. Rptr. at 261.

66. *Id.* at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (emphasis added).

67. *Id.* at 492, 698 P.2d at 161, 213 Cal. Rptr. at 258. Plaintiffs sued Tech-Bilt (the developer) and Woodward-Clyde (the soil engineers) for structural defects in their premises. Woodward-Clyde informed the plaintiffs that it had completed its services more than 10 years previously, thus the statute of limitations barred their claim. The plaintiffs agreed to dismiss Woodward-Clyde in exchange for Woodward-Clyde's agreement to waive its claim for costs in defending the lawsuit. The court noted that although the statute may have run against Woodward-Clyde on the plaintiffs' claim, this would not necessarily have barred Tech-Bilt from asserting a claim against Woodward-Clyde for partial indemnity. *Id.* at 491-92, 698 P.2d at 161-62, 213 Cal. Rptr. at 258-59. Hence, the lower court's determination that the settlement between Woodward-Clyde and the plaintiffs was made in good faith adversely affected Tech-Bilt by insulating Woodward-Clyde from a cross-claim for partial indemnity.

68. Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 146 Cal. App. 3d 1146, 194 Cal. Rptr. 729 (1983), *rev'd*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

69. *Tech-Bilt*, 38 Cal. 3d at 496, 698 P.2d at 164, 213 Cal. Rptr. at 256.

ment of Code of Civil Procedure section 877.6,[70] the legislature had incorporated the goals of equitable allocation of costs and encouragement of settlement into the good faith standard.[71] A tortious conduct approach, the court reasoned, emphasized the goal of encouraging settlement to the virtual exclusion of the equitable allocation goal. In adopting a reasonable range analysis, the court determined that requiring the settlement to be reasonably related to the settling party's liability would prevent an unfair shift of liability to the nonsettling party. Moreover, the court determined that this approach is not detrimental to the settlement process "[s]ince the 'reasonable range' test . . . leaves substantial latitude to the parties and to the discretion of the trial court . . . ."[72]

Two questions, however, were left unresolved by the *Tech-Bilt* decision: (1) whether the good faith reasonable range standard applies to sliding scale settlements; and (2) if so, the manner in which this standard is to be applied.

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70. In 1980, the California legislature enacted California Code of Civil Procedure § 877.6 which governs the mechanics of a good faith hearing. The statute also provides that a good faith settlement insulates the settling party from any claims for equitable comparative contribution or partial or comparative indemnity. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986). The *Tech-Bilt* court reasoned that this statute represented a codification of American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), and incorporated the equitable policies expressed in that decision. *Tech-Bilt*, 38 Cal. 3d at 496, 698 P.2d at 164, 213 Cal. Rptr. at 261. See *supra* notes 35-36 and accompanying text for a discussion of *American Motorcycle*. Section 877.6 reads in part:

> (a) Any party to an action wherein it is alleged that two or more parties are joint tortfeasors shall be entitled to a hearing on the issue of the good faith of a settlement entered into by the plaintiff or other claimant and one or more alleged tortfeasors, upon giving notice thereof in the manner provided in Sections 1010 and 1011 at least 20 days before the hearing. . . . Upon a showing of good cause, the court may shorten the time for giving the required notice to permit the determination of the issue to be made before the commencement of the trial of the action, or before the verdict or judgment if settlement is made after the trial has commenced.
>
> (b) The issue of the good faith of a settlement may be determined by the court on the basis of affidavits served with the notice of hearing, and any counteraffidavits filed with response thereto, or the court may, in its discretion, receive other evidence at the hearing.
>
> (c) A determination by the court that the settlement was made in good faith shall bar any other joint tortfeasor from any further claims against the settling tortfeasor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.
>
> (d) The party asserting the lack of good faith shall have the burden of proof on that issue.

CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986).

71. *Tech-Bilt*, 38 Cal. 3d at 498-99, 698 P.2d at 166, 213 Cal. Rptr. at 263.

72. *Id.* at 500, 698 P.2d at 167, 213 Cal. Rptr. 264 (citing Roberts, *supra* note 39, at 928-29).

III. SLIDING SCALE SETTLEMENT AGREEMENTS

A. *The Anatomy of a Sliding Scale Settlement Agreement*

Sliding scale settlements typically arise when there are multiple defendants who are each jointly and severally liable for the plaintiff's entire injury. The plaintiff will settle with one or more of the defendants but never with all of them. The most important aspect of a sliding scale agreement is the guarantee clause. In this clause, the settling defendants guarantee the plaintiff a certain minimum recovery regardless of how the action against the remaining defendant is ultimately decided. If a judgment is returned against the nonsettling defendant for an amount equal to or in excess of the guarantee amount, the settling defendants pay nothing. If a judgment is returned for less than the guarantee amount, the settling defendants pay the difference between the judgment and the guarantee. Finally, if the nonsettling party prevails at trial and is relieved from all liability, the settling defendants must pay the plaintiff the entire guarantee amount.[73] In exchange, the plaintiff agrees to drop all claims against the settling parties. If the court approves the agreement as executed in good faith, the settling parties are protected from cross-claims for partial indemnity from their co-defendants.[74]

In addition, the settling defendants generally agree to remain parties to the action,[75] which the plaintiff will usually be required to maintain against the remaining defendant. Commonly, the settlement prohibits the plaintiff from reaching an agreement with any remaining defendants for an amount less than the guarantee amount, unless approval is first obtained from the settling parties.[76] Finally, a common feature of many early sliding scale agreements was secrecy; the existence of an agreement was usually not revealed to the nonsettling defendant. Today, however, many jurisdictions require disclosure of such agreements, at least to the court.[77]

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73. Freedman, *The Expected Demise of "Mary Carter": She Never Was Welll*, 633 INS. L.J. 603, 609-10 (1975); Comment, *The Mary Carter Agreement—Solving the Problems of Collusive Settlements in Joint Tort Actions*, 47 S. CAL. L. REV. 1393, 1396-97 (1974).

74. CAL. CIV. PROC. CODE § 877 (West 1980).

75. Comment, *supra* note 73, at 1396.

76. *See, e.g.*, Burlington N. R.R. v. Superior Court, 137 Cal. App. 3d 942, 944, 187 Cal. Rptr. 376, 377 (1982), *disapproved on other grounds*, Tech-Bilt v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985). A good example of a typical sliding scale agreement can be found in *Burlington*. There the settling defendant guaranteed plaintiff a $2,000,000 recovery. In return, plaintiff agreed to press his action against the remaining defendant and not to accept a settlement from him of less than $2,000,000 without Burlington's approval. *Id.* at 944, 187 Cal. Rptr. at 377.

77. See *infra* note 86 and accompanying text for a list of such jurisdictions.

B. *Judicial Reaction to Sliding Scale Settlements*

Courts throughout the country have expressed reservations regarding sliding scale settlements—also known as "Mary Carter" agreements—and their effects on nonsettling defendants. Concerns about sliding scale agreements first gained prominence in the 1967 Florida case of *Booth v. Mary Carter Paint Co.*[78] In that case, the plaintiff charged three defendants with negligent operation of their automobiles, resulting in the death of his wife.[79] Prior to trial, the plaintiff and one defendant negotiated a "Mary Carter" agreement which guaranteed the plaintiff a $12,500 recovery and limited the settling defendant's potential maximum contribution to that amount.[80] The settlement was structured so that the settling defendant's liability was reduced as the recovery against the remaining defendant reached higher levels. The *Booth* court upheld this agreement as valid,[81] and the generic name for sliding scale settlements was born.[82]

Subsequently, *Booth* was partially rejected in *Ward v. Ochoa.*[83] In that case, the Florida Supreme Court, without rejecting "Mary Carter" agreements per se,[84] required that they be admitted into evidence at the request of the nonsettling party.[85] Many jurisdictions around the country have adopted a similar approach when addressing sliding scale settlements.[86]

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78. 202 So. 2d 8 (Fla. Dist. Ct. App. 1967).

79. *Id.* at 8.

80. *Id.* at 10.

81. *Id.* at 11.

82. California courts uniformly refer to such agreements as sliding scale settlements.

83. 284 So. 2d 385 (Fla. 1973).

84. In one case, a Florida court was asked to invalidate "Mary Carter" agreements as violative of public policy. Maule Indus., Inc. v. Rountree, 264 So. 2d 445 (Fla. Dist. Ct. App. 1972). The *Maule* court refused, stating "we can neither condone nor condemn such agreements generically." *Id.* at 447.

85. *Ward*, 284 So. 2d at 387. The court held: "If the agreement shows that the signing defendant will have his maximum liability reduced by increasing the liability of one or more co-defendants, such agreement should be admitted . . . upon the request of any other defendant who may stand to lose as a result of such agreement." *Id.*

86. *See* Anderson v. Kemp, 279 Ala. 321, 184 So. 2d 832 (1966) (nonsettling defendant may enter sliding scale settlement into evidence to show partial compensation to plaintiff for his injury); Sequoia Mfg. Co. v. Halec Const. Co., 117 Ariz. 11, 570 P.2d 782 (Ariz. Ct. App. 1977) (sliding scale agreements may be admitted into evidence at discretion of trial judge); Health & Hosp. Corp. v. Gaither, 272 Ind. 251, 397 N.E.2d 589 (1979) (agreements must be disclosed when necessary to ensure nonsettling defendant a fair trial); General Motors Corp. v. Lahoki, 286 Md. 714, 410 A.2d 1039 (Md. 1980) (jury should be informed as to agreement between parties); Degen v. Bayman, 86 S.D. 598, 200 N.W.2d 134 (1972) (disclosure of agreement's existence but not of amount is at discretion of trial judge); General Motors Corp. v. Simmons, 558 S.W.2d 855 (Tex. 1977), *overruled on other grounds*, Duncan v. Cessna Aircraft Co., 665 S.W.2d 414 (Tex. 1984) (sliding scale agreements must be admitted into evidence

An example of the inequity which can result when a sliding scale agreement is kept secret occurred in *Ponderosa Timber & Clearing Co. v. Emrich*.[87] In *Ponderosa Timber*, the plaintiffs and the insurance carrier for two co-defendants entered into a secret sliding scale settlement. The settlor guaranteed the plaintiffs a recovery of $20,000 in return for the plaintiffs' agreement to press their action against the remaining defendants. If the plaintiffs won a verdict in excess of $20,000 at trial the insurance carrier would pay nothing.[88] At the trial, the attorney for the insurance carrier stated to the jury that, in the interest of justice, he must inform them that there was no merit to any of the defenses which had been asserted at the trial.[89] Since the jury was unaware of the defendants' interest in a large verdict for the plaintiff, the attorney's statement was obviously quite damaging to the nonsettling defendants.[90]

At least one jurisdiction completely prohibited sliding scale agreements as contrary to public policy. In *Lum v. Stinnett*,[91] the Nevada Supreme Court ruled that "Mary Carter" agreements contravened public policy as well as the goals underlying the Canons of Professional Conduct.[92] The court reasoned that it was improper to allow a situation where defense counsel continued to participate in the litigation while his interest was actually in furthering the plaintiff's cause.[93]

C. *California Statutory Enactment—Section 877.5*

It was in this environment that the California Legislature enacted Code of Civil Procedure section 877.5.[94] Section 877.5 compels the dis-

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under certain circumstances). California codified the disclosure requirement under certain circumstances. CAL. CIV. PROC. CODE § 877.5 (West 1980). *See infra* notes 94-98. For a discussion of the differing approaches to the secrecy issue, see Comment, *Mary Carter Agreements: A Viable Means of Settlement?*, 14 TULSA L.J. 744, 752-61 (1979).

87. 86 Nev. 625, 472 P.2d 358 (1970).

88. *Id.* at 627, 478 P.2d at 359.

89. *Id.* at 628, 478 P.2d at 360.

90. The jury returned a verdict against all the defendants for $35,000. *Id.* at 626, 472 P.2d at 359.

91. 87 Nev. 402, 488 P.2d 347 (1971).

92. The court refers to a statement issued by the Arizona State Bar Committee on Rules of Professional Conduct. *Id.* at 409-11, 488 P.2d at 351-52.

93. *Id.* at 409-11, 488 P.2d at 351-52. Since then, but after California enacted § 877.5, the Oklahoma courts articulated the following rule: If the sliding scale agreement hinges on the amount of the ultimate verdict, the trial court should review the agreement and either hold that the portion granting the settling defendant an interest in a larger defense verdict invalid as against public policy, or dismiss the settling defendant from the suit. Cox v. Kelsey-Hayes Co., 594 P.2d 354, 359 (Okla. 1978).

94. Cal. A.B. 1275, 1977-78 Reg. Sess. (1977) (codified at CAL. CIV. PROC. CODE § 877.5 (West 1980)). The statute reads as follows:

closure of existing sliding scale settlements to the court.[95] The statute further provides that when a party defendant to the agreement testifies, the jury shall be informed of the agreement upon motion of a party to the action.[96] Disclosure to the jury is not compelled if such disclosure will create "substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."[97]

The text of the statutes speaks only to the issue of secrecy. However, the courts have interpreted this statute, in conjunction with Code of Civil Procedure section 877,[98] to require that sliding scale agreements meet good faith standards.

D. Judicial Decisions After the Enactment of Section 877.5

An early appellate decision discussing sliding scale settlements and good faith was *Dompeling v. Superior Court*.[99] In that case Dompeling, the driver of a large truck, swerved to avoid a school bus stopped alongside the road. The truck collided with an oncoming car, severely injuring

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(a) Where an agreement or covenant is made which provides for a sliding scale recovery agreement between one or more, but not all, alleged defendant tortfeasors and the plaintiff or plaintiffs:

(1) The parties entering into any such agreement or covenant shall promptly inform the court in which the action is pending of the existence of the agreement or covenant and its terms and provisions; and

(2) If the action is tried before a jury, and a defendant party to the agreement is a witness, the court shall, upon motion of a party, disclose to the jury the existence and content of the agreement or covenant, unless the court finds that such disclosure will create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

The jury disclosure herein required shall be no more than necessary to be sure that the jury understands (1) the essential nature of the agreement, but not including the amount paid, or any contingency, and (2) the possibility that the agreement may bias the testimony of the alleged tortfeasor or tortfeasors who entered into the agreement.

(b) As used in this section a "sliding scale agreement" means an agreement or covenant between a plaintiff or plaintiffs and one or more, but not all, alleged tortfeasor defendants, where the agreement limits the liability of the agreeing tortfeasor defendants to an amount which is dependent upon the amount of recovery which the plaintiff is able to recover from the nonagreeing defendant or defendants. This includes, but is not limited to, agreements within the scope of Section 877, and agreements in the form of a loan from the agreeing tortfeasor defendant to the plaintiff or plaintiffs which is repayable in whole or in part from the recovery against the nonagreeing tortfeasor defendant.

CAL. CIV. PROC. CODE § 877.5 (West 1980).

95. CAL. CIV. PROC. CODE § 877.5(a)(1) (West 1980).

96. *Id.* § 877.5(a)(2).

97. *Id.*

98. *See infra* notes 99-107 and accompanying text.

99. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved on other grounds*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

its driver. The plaintiff sued both Dompeling and the school district responsible for operating the bus. Prior to trial, the plaintiff and Dompeling negotiated a sliding scale settlement.[100] In upholding the agreement, the *Dompeling* court applied the good faith requirement of California Code of Civil Procedure section 877.[101] It concluded that, like any other settlement releasing a joint tortfeasor from liability, a sliding scale agreement must meet the test of good faith. However, it employed a tortious conduct test, stating that " *'a joint tortfeasor should be permitted to negotiate settlement of an adverse claim to his own best interests* . . . . His good faith will not be determined by the proportion his settlement bears to the damages of the claimant.' "[102]

The court faced a similar challenge to the good faith of a sliding scale agreement in *Burlington Northern Railroad Co. v. Superior Court.*[103] The injury in that case occurred when the door of a refrigerator car owned by Burlington Northern and manufactured by Paccar fell on the plaintiff causing serious injury. The plaintiff and Burlington Northern agreed to a sliding scale settlement which guaranteed the plaintiff a $2,000,000 recovery. Paccar challenged the good faith of the agreement.[104] Just as in *Dompeling*, the *Burlington Northern* court analyzed the good faith of the agreement under section 877.[105] In approving the settlement, the court employed a tortious conduct test requiring only that, in negotiating the agreement, the settling parties refrain from tortious or other wrongful conduct aimed at the nonsettling parties.[106]

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100. The agreement guaranteed the plaintiff a recovery of $100,000. This represented the limits of Dompeling's liability insurance. Under the agreement, Dompeling might also have been required to contribute an additional $10,000 depending on the plaintiff's recovery from the remaining defendant. *Id.* at 802, 173 Cal. Rptr. at 40.

101. *Id.* at 805 n.5, 173 Cal. Rptr. at 42 n.5. In its analysis of good faith the court relied on cases employing Code of Civil Procedure § 877. *Id.* at 805-09, 173 Cal. Rptr. 41-44 (citing Stambaugh v. Superior Court, 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985) (disapproving cases employing tortious conduct test for good faith similar to test employed by the *Stambaugh* court); River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972)).

102. *Id.* at 806, 173 Cal. Rptr. at 42-43 (quoting Stambaugh v. Superior Court, 62 Cal. App. 3d at 238, 132 Cal. Rptr. at 847-48 (1976) (emphasis in original)).

103. 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982), *disapproved on other grounds*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

104. *Id.* at 944, 187 Cal. Rptr. at 377. The trial court agreed that the settlement was not consumated in good faith because it ignored equitable apportionment and failed to promote settlement of litigation. *Id.*

105. *Id.* at 944-47, 187 Cal. Rptr. at 377-79. The court discussed § 877 and then proceeded to define good faith using cases which interpreted that statute. *Id.*

106. *Id.* at 945-47, 187 Cal. Rptr. at 378-79. The court questioned the fairness of the agree-

Without exception, courts have reaffirmed the principle that sliding scale agreements must meet the good faith standards established for other pretrial settlements involving multiple tortfeasors.[107] Moreover, in *Tech-Bilt* the supreme court settled the dispute as to which good faith standard was correct by adopting a reasonable range analysis.

IV. GOOD FAITH AND SLIDING SCALE SETTLEMENTS AFTER *TECH-BILT*

In recent months three cases concerning the good faith of sliding scale settlements have been decided. These cases illustrate many of the motivations for entering into such agreements. Initially, this section will discuss the facts of each case as well as the reasoning for each court's decision. Subsequently, the decisions will be examined in light of the general principles of the contribution statutes and the good faith principles articulated by the supreme court in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*.[108] Finally, this section will recommend modifications to the rules announced in the appellate court opinions to conform these rules to the California Supreme Court's determinations in the *Tech-Bilt* opinion.

A. Examination of the Cases

1. *Riverside Steel Construction Co. v. William H. Simpson Construction Co.*

The first case decided after the *Tech-Bilt* decision that analyzed a sliding scale settlement was *Riverside Steel Construction Co. v. William H. Simpson Construction Co.*[109] In that case, the plaintiff suffered injuries when he fell from a building during its construction. The plaintiff sued both the general contractor (Simpson) and the subcontractor (Riverside) for negligent maintenance of the work site.[110] The plaintiff and Simpson

ment but stated that such policy considerations were matters for the legislature. *Id.* at 946, 187 Cal. Rptr. at 379.

107. A recent case reiterating that the good faith rules apply to sliding scale settlements is Riverside Steel Constr. Co. v. William H. Simpson Constr. Co., 171 Cal. App. 3d 781, 795, 217 Cal. Rptr. 569, 577, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985). For a discussion of *Riverside Steel*, see *infra* notes 109-26 and accompanying text. The *Riverside Steel* court stated that, although few California appellate decisions discussing sliding scale settlements had been decided after the enactment of § 877.5, those which had required the agreements to meet the standards of good faith. The *Riverside Steel* court reaffirmed that premise. *Id.*

108. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985); see *supra* notes 64-72, *infra* notes 197-207 and accompanying text for a discussion of *Tech-Bilt*.

109. 171 Cal. App. 3d 781, 217 Cal. Rptr. 569, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985).

110. *Id.* at 785-86, 217 Cal. Rptr. at 571.

negotiated a sliding scale settlement which guaranteed the plaintiff a $350,000 recovery. The agreement also provided that if a judgment was returned against Riverside for $350,000 or more Simpson would not be required to pay anything. The trial court's determination that the settlement was made in good faith was challenged by Riverside.[111]

The appellate court affirmed the good faith finding. In doing so, it addressed several issues generated by the supreme court's decision in *Tech-Bilt*.[112] The court focused its analysis on Riverside's claim that, by disapproving *Dompeling v. Superior Court*[113] and *Burlington Northern Railroad Co. v. Superior Court*,[114] the *Tech-Bilt* majority meant to reject all sliding scale settlements that did not include a minimum unconditional contribution from the settling defendant.[115] Riverside asserted that the proper determinant of whether a settlement price was within the reasonable range of the settling party's fair share of potential liability is the settling party's minimum unconditional contribution, not the maximum amount guaranteed by the settlement.[116]

The *Riverside Steel* court concluded that this interpretation of *Tech-Bilt* was both textually and analytically unsound. From a textual viewpoint, nowhere in the *Tech-Bilt* opinion did the court mention or even discuss a minimum contribution requirement.[117] Moreover, the *Tech-Bilt* court chose to overrule *Dompeling* and *Burlington Northern* only in a footnote with little elaboration.[118] From this the *Riverside Steel* court concluded "we do not believe that the *Tech-Bilt* majority intended to cavalierly overturn a legislative enactment in a footnote without discussing that subject."[119] Rather, the *Riverside Steel* court found that *Tech-Bilt* merely disapproved of the language in those cases asserting that good faith meant only the absence of tortious or collusive conduct.[120]

Analytically speaking, the court reasoned that, if adopted, River-

111. *Id.* at 789, 217 Cal. Rptr. at 573.

112. *Id.* at 792-97, 217 Cal. Rptr. at 576-79. The *Riverside Steel* court began by determining that the *Tech-Bilt* decision applied to sliding scale settlements. *Riverside Steel*, 171 Cal. App. 3d at 794, 217 Cal. Rptr. at 577.

113. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985).

114. 137 Cal. App. 3d 942, 186 Cal. Rptr. 793 (1982), *disapproved, Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7.

115. *Riverside Steel*, 171 Cal. App. 3d at 793-94, 217 Cal. Rptr. at 577.

116. *Id.* at 794, 217 Cap. Rptr. at 577.

117. *Id.*

118. *Id.* (citing *Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7).

119. *Id.*

120. *Id.*

side's framework would render sliding scale settlements valueless.[121] This premise was based on the structure of such settlements. Under Riverside's approach, the settling defendant must agree to contribute a minimum amount which is within the reasonable range of its own potential liability. If that were the case it seems highly unlikely that in addition to agreeing to pay its fair share of liability, a settling defendant would also agree to guarantee the plaintiff a recovery greatly in excess of that amount.[122] The settling defendant would be better off with a straight settlement for an amount reasonably reflecting his liability which does not expose him to the further risk of paying the guarantee amount. Moreover, the court reasoned, a minimum contribution requirement would discourage settlements.[123] This is true because, knowing that the settlement amount would be deducted from any judgment against them, nonsettling defendants would be risking little by continuing to trial. Should they lose, all they would be required to pay is their proportionate share of fault. If they prevail they would pay nothing. Finally, the court agreed with Simpson's assertion that *Tech-Bilt* merely focused on proportionality as one factor in a host of considerations which should be examined in a good faith analysis.[124] Therefore, it was unnecessary to hold an agreement which did not call for an unconditional minimum requirement as *per se* in bad faith.[125]

After concluding that the settlement was not invalid as a matter of law the court sidestepped the good faith determination. Since Riverside had not raised the issue in the trial court, the appellate court concluded that it could not address whether Simpson's settlement was within the reasonable range of its potential liability.[126]

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121. *Id.* at 796, 217 Cal. Rptr. at 578.

122. *Id.* Discussed *infra* at note 242 and accompanying text.

123. *Id.* Although the *Riverside Steel* court does not discuss it, *Tech-Bilt* recognized encouraging settlements as a goal of the tort contribution statutes. *See Tech-Bilt*, 38 Cal. 3d at 494, 698 P.2d at 163, 213 Cal. Rptr. at 260.

124. *Riverside Steel*, 171 Cal. App. 3d at 794, 217 Cal. Rptr. at 577.

125. *Id.* Without developing the point, the *Riverside Steel* court observed that even though no unconditional minimum contribution requirement was called for, the settlement guarantee had a certain value analogous to an insurance policy protecting the plaintiff from a defense verdict. This value, the court reasoned, should be considered in determining whether the settlement price met reasonable range requirements. *Id.*

126. *Id.* at 797-78, 217 Cal. Rptr. at 579. The court mentioned two additional factors it would have considered in a good faith determination had it considered the issue. First, the court suggested that the amount of money the party challenging good faith set as the total value of the plaintiff's claim and the amount that party stands ready to contribute to a settlement should be considered. More importantly, the court instructed that any provisions in a settlement designed to discourage settlement with defendants who are not parties to the agreement are void as violative of public policy. *Id.* at 798, 217 Cal. Rptr. at 579-80.

2. *Abbott Ford, Inc. v. Superior Court*

In *Abbott Ford, Inc. v. Superior Court*,[127] a woman was seriously injured when a tire jarred loose from an oncoming van and smashed through her windshield. The woman sued several defendants for personal injuries including her loss of vision. Her husband sued for loss of consortium. In settlement negotiations, defendant Abbott offered to cover seventy percent of plaintiffs' estimated recovery if all parties would agree to settle. The other defendants refused the offer. The plaintiffs and Abbott then reached a sliding scale agreement whereby Abbott guaranteed a $3,000,000 recovery for all the claims. The agreement prohibited the plaintiffs from settling with the remaining defendants for under $3,000,000 without Abbott's consent and also provided that if the final award equaled or exceeded $3,000,000, Abbott would not have to contribute to the recovery at all.[128]

The trial court refused to approve the agreement as a good faith settlement. Its rejection of the agreement was based " 'on the fact that Abbott Ford had not paid any amount in settlement and that the guarantee agreement does not constitute [a] settlement, but rather constitutes a gambling transaction.' "[129] The appellate court disagreed, although it acknowledged that the principles outlined in *Tech-Bilt* were applicable to sliding scale settlements.[130]

Initially, in determining whether the sliding scale settlement before it conformed with the good faith standards set forth in *Tech-Bilt*, the *Abbott* court engaged in a public policy discussion. The court endeavored to elucidate the interests served by this particular settlement. Among the benefits the court attributed to the agreement were the immediate cash payments the plaintiffs would receive. This money would not only help support the plaintiffs until the final resolution of the action, but it would ensure the plaintiffs' financial ability to pursue a recovery. The court also found compelling the fact that the agreement provided a willing defendant the opportunity to settle despite the "recalcitrance" of its co-defendants.[131]

The *Abbott* court only briefly discussed the settlement in terms of the reasonable range analysis adopted by the supreme court in *Tech-Bilt*. Relying on *Tech-Bilt* and *Riverside Steel*, the *Abbott* court reasoned that

127. 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985).

128. *Id.* at 678-80, 218 Cal. Rptr. at 607-08.

129. *Id.* at 681, 218 Cal. Rptr. at 609 (citing a minute order filed by the trial court).

130. *Id.*

131. *Id.* at 684-85, 218 Cal. Rptr. at 611-12.

"ultimate disproportionate allocation in and of itself was not necessarily a mark of bad faith."[132] It then relied on *Riverside Steel* to conclude that an agreement, though potentially allowing one culpable tortfeasor to escape the action while paying nothing, did not necessarily fail the reasonable range test for good faith.[133] The court rested its conclusion on two critical factors: First, the strong public policies served by the settlement[134] and second, the fact that *Tech-Bilt* listed a host of factors to consider in a good faith determination, only one of which was apportionment of damages.[135]

The *Abbott* court justified the settlement as a carefully considered and appropriate response to the practical position of the settling party at the time it was executed, and found "noteworthy" the extent to which the agreement served the interests of the plaintiff.[136] The court concluded that, considering the circumstances under which the settlement was negotiated, no violation of the *Tech-Bilt* principles had occurred.

3. *City of Los Angeles v. Superior Court*

In *City of Los Angeles v. Superior Court*,[137] the plaintiff was involved in a car accident in which his automobile overturned. He was taken to the emergency room at a local hospital where he was examined by a physician. Because of his blood alcohol level, the hospital released the plaintiff to the police, who arrested him and took him to the City jail. The plaintiff's mother picked him up there and brought him home. Since he was unable to move his lower extremities, the plaintiff's mother had an ambulance return him to the hospital. He became a parapalegic who also lost some use of his arms.[138]

The plaintiff sued the hospital, the ambulance service and the examining physician for medical negligence. He sued the City for its negligence in handling, transporting, booking and confining him. He also alleged a battery for his detention, arrest and handling by the City.[139]

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132. *Id.*

133. *Id.*

134. *See supra* note 131 and accompanying text.

135. *Id.* at 682, 684, 218 Cal. Rptr. at 610-11. Among the factors the *Abbott* court lists were: " 'a rough approximation of the plaintiffs' total recovery and the settlor's proportionate liability, the amount paid in settlement, . . . and a recognition that settlor should pay less in settlement than he would if he were found liable after a trial.' " *Id.* at 682, 218 Cal. Rptr. at 610 (citing *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263).

136. *Id.* at 685, 218 Cal. Rptr. at 612.

137. 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986), *vacating and remanding* 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (1984).

138. *Id.* at 860-61, 222 Cal. Rptr. at 564.

139. *Id.* at 861, 222 Cal. Rptr. at 564.

Prior to trial, the plaintiff and all defendants except the City entered into a sliding scale settlement.[140] The terms of the agreement[141] were as follows:

> 1) The settling defendants would loan the plaintiff the price of an annuity contract. This annuity would provide the plaintiff with $5000 monthly payments for life and certain deferred lump sum payments.[142]
>
> 2) If the City of Los Angeles obtained a defense verdict at the conclusion of the litigation,[143] the settling defendants would pay the plaintiff $750,000 and absolve him from responsibility to repay the loan used to purchase the annuity.[144]
>
> 3) If the plaintiff obtained a judgment against the City equal to or exceeding the guarantee amount,[145] the settling defendants would be released from further liability and the plaintiff would repay to the settling defendants the loan used to purchase the annuity.[146]
>
> 4) If the plaintiff obtained a judgment against the City for less than the guarantee amount, the settling defendants would pay the plaintiff the difference between the amount of the judgment and the guarantee amount.[147]
>
> 5) Plaintiff was further required to prosecute this action against the City of Los Angeles in the same way he would have proceeded in the absence of this agreement.[148]

Upon motion by the settling defendants, the trial court determined

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140. *Id.* at 861-62, 222 Cal. Rptr. at 565. The City, it appears, did not seriously attempt to negotiate a pretrial settlement with the plaintiff. Although the final settlement agreed upon with the other defendants was for $1,900,000, the City never mentioned a contribution of more than $50,000 during the settlement negotiations. *Id.* at 862, 222 Cal. Rptr. at 565.

141. Agreement between Paul Hutcherson and Daniel Freeman Memorial Hospital, its agents, Jerome Robinson, M.D., and Goodhew Ambulance Service, *Release and Sliding Scale Recovery Agreements* (copy on file with *Loyola of Los Angeles Law Review*) [hereinafter cited as Agreement].

142. *Id.*

143. *Id.* at 3. By terms of the Agreement, "conclusion of the litigation" was defined as:

> [A] final judgment after trial, appeal, and retrial of this litigation, if any, together with the trial, appeal, and retrial of any and all actions necessary to resolve any questions of any tortfeasor's insurance coverage, as well as any and all questions with respect to interpretation and enforceability of any portion of this Agreement . . . .

Agreement, *supra* note 141, at 3.

144. *City of Los Angeles*, 176 Cal. App. 3d at 861, 222 Cal. Rptr. at 565.

145. The guarantee amount equalled the purchase price of the annuity plus the $750,000 guarantee. The present value of this amount was estimated at $1.9 million dollars. *Id.*

146. *Id.* at 861-62, 222 Cal. Rptr. at 565.

147. *Id.* at 861, 222 Cal. Rptr. at 565.

148. Agreement, *supra* note 141, at 8.

that the agreement met good faith requirements. The court of appeal affirmed the trial court's findings. Although the California Supreme Court granted a hearing to review the case, it was returned to the appellate court for reconsideration in light of the principles enunciated in *Tech-Bilt*.[149] Following remand from the supreme court, the court of appeals discussed the good faith requirements for sliding scale settlements and remanded the case to the trial court for further factual findings.

The appellate court considered the primary issue to be whether the Agreement, which potentially placed the entire burden of loss on the City, was *per se* not in good faith.[150] The court stated that any good faith determination must take into account the numerous factors set forth in *Tech-Bilt*.[151] Any settlement so far "out of the ballpark" in relation to those factors as to defeat the equitable objectives of the contribution statutes would fail the test of good faith. Citing *Riverside Steel*,[152] the *City of Los Angeles* court reasoned that because apportionment of damages was only one in a host of good faith factors which must be viewed together, a sliding scale settlement lacking a minimum contribution requirement was not a bad faith settlement as a matter of law.[153] The court supported this conclusion by observing that the settling defendants had undertaken the risk of a $1,900,000 liability should the City win a defense verdict at trial. Under such circumstances, an agreement could not be rejected *per se* merely because the settling defendants potentially would pay nothing. That possibility was only one factor to examine in arriving at a good faith determination.[154]

Having concluded that the sliding scale settlement was not invalid as a matter of law, the appellate court held that a good faith determination was factual in nature and should therefore be resolved by the trial court.[155] As a result, the only concrete rule emanating from the appellate decision is that a sliding scale settlement not requiring an unconditional minimum contribution from each potentially liable defendant does not necessarily fail the reasonable range test for good faith.

149. *City of Los Angeles*, 176 Cal. App. 3d at 862, 222 Cal. Rptr. at 565 (citing *Tech-Bilt*, 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985)).

150. *Id.* at 867, 222 Cal. Rptr. at 568-69.

151. *Id.* at 868, 222 Cal. Rptr. at 569.

152. See *supra* note 109-26 and accompanying text for a discussion of *Riverside Steel*.

153. *City of Los Angeles*, 176 Cal. App. 3d at 876, 222 Cal. Rptr. at 569.

154. *Id.* at 868-70, 222 Cal. Rptr. at 569-70.

155. *Id.* at 870, 222 Cal. Rptr. at 570.

V. ANALYSIS

By rejecting an unconditional minimum contribution requirement, the *City of Los Angeles v. Superior Court*,[156] *Abbott Ford, Inc. v. Superior Court*,[157] and *Riverside Steel Construction Co. v. William H. Simpson Construction Co.*[158] courts have effectively allowed courts to ignore the dictates of *Tech-Bilt*. As a result, under the guise of encouraging settlement, one defendant, who may have been only minimally liable for a plaintiff's injury, may be required to pay an entire judgment. The following analysis considers whether the legislature intended this potential inequity when it enacted Code of Civil Procedure section 877.5[159] and whether fairness and efficiency are better promoted by requiring all sliding scale agreements to include an unconditional minimum contribution.

A. The Costs and Benefits of Sliding Scale Settlements

Sliding scale settlements provide several clear benefits. First, they often provide a plaintiff with an instant source of cash[160] which solves several immediate problems. For example, a plaintiff in a personal injury action often needs immediate relief to pay medical and related expenses. Additionally, the settlement funds enable the plaintiff to finance suits against nonsettling defendants.[161] Moreover, sliding scale settlements encourage at least partial settlement of suits.[162] A defendant that is able

156. 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986), *vacating and remanding* 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (1984).

157. 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985) (opinion to remain published and citable as authority).

158. 171 Cal. App. 3d 781, 217 Cal. Rptr. 569, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985) (opinion to remain published and citable as authority).

159. CAL. CIV. PROC. CODE § 877.5 (West 1980). *See supra* notes 94-98.

160. This is true, of course, only if the agreement calls for payment of some of the settlement prior to a final judgment. For example, the agreement in *City of Los Angeles* provided a loan to the plaintiffs from the settling defendants to purchase an annuity contract. The loan would be repaid with any money the plaintiff received in a judgment in excess of the guarantee amount. *See supra* text accompanying notes 141-42.

161. Thornton & Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts, or Unholy Alliances?*, 43 INS. COUNS. J. 226, 227 (1976).

162. Encouraging settlements is a strong public policy in California. Sears, Roebuck & Co. v. International Harvester Co., 82 Cal. App. 3d 492, 496, 147 Cal. Rptr. 262, 265 (1978). However, it is unclear whether encouraging "partial" settlement is as strong a public policy. In *Sears*, the court explained that the simplification of litigation resulting from the presence of one less joint tortfeasor in a case is a subordinate policy consideration. *Id.* at 497, 147 Cal. Rptr. at 264-65. The court in *Tech-Built, Inc. v. Woodward-Clyde & Assocs.* appeared to agree that while encouraging total settlement is a primary goal, encouraging partial settlement is only a subordinate goal. *Tech-Bilt*, 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264. *See* Roberts, *supra* note 39, at 889-91 nn.202-04; Comment, *Settlement in Joint Tort Cases*, 18 STAN. L. REV. 486, 489 (1966).

to reach an agreement with a plaintiff can get out of a suit and limit his potential liability. Finally, sliding scale settlements protect the plaintiff's interest by providing for a guarantee of a minimum recovery.[163]

While providing benefits to the plaintiff and the settling defendants, sliding scale agreements often exact substantial costs from the nonsettling defendant. Initially, the agreement diminishes the chance that the nonsettlor will be able to reach a settlement with the plaintiff. Because the plaintiff has just received a cash infusion from his initial settlement, he is now well funded and quite probably in a "litigatious frame of mind."[164] Equipped with a guaranteed minimum recovery, the plaintiff can hold out for a large settlement from the nonsettling defendant. In most sliding scale agreements, the plaintiff is prohibited from settling with the remaining defendant for anything less than the guarantee amount of the initial agreement.[165] Ultimately, sliding scale agreements may work not to promote settlement but rather to ensure that litigation will continue.

These agreements also force the remaining defendant to ward off not only the plaintiff but also the settling defendants who now have a financial interest in a large judgment. California has partially solved this problem by requiring disclosure of sliding scale settlements to the court and often to the jury,[166] thus reducing the risk of a settling defendant fooling the jury by admitting liability at the trial.[167] However, introducing a sliding scale agreement into evidence may damage rather than help the nonsettling defendant. Such agreements can be drafted in a manner which deters the remaining defendant from submitting it to the jury. For example, the agreement may contain a preamble which intimates that the nonsettling defendant, among other things, is primarily responsible for the injury.[168]

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163. *See* Fisher v. Superior Court, 103 Cal. App. 3d 434, 163 Cal. Rptr. 47 (1980). The court stated "maximization of recovery to the injured party for the amount of his injury to the extent fault of others has contributed to it" is first in the hierarchy of interests. *Id.* at 447, 163 Cal. Rptr. at 56.

164. Thornton & Wick, *supra* note 161, at 228. This again raises the question of whether California promotes partial settlement of litigation as a primary public policy. *See supra* note 162. A recent California decision disputes the claim that the existence of a sliding scale settlement makes total settlement of the action less likely. Riverside Steel Constr. Co. v. William H. Simpson Constr. Co., 171 Cal. App. 3d 781, 791, 217 Cal. Rptr. 569, 575, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); *see supra* notes 109-26 and accompanying text.

165. *See supra* note 76 and accompanying text.

166. *See supra* notes 94-98 and accompanying text. *See also* CAL. CIV. PROC. CODE § 877.5 (West 1980).

167. *See supra* notes 87-90 and accompanying text.

168. Thornton & Wick, *supra* note 161, at 234. These authors point to an agreement with a preamble accusing the nonsettling defendant of harboring a defiant attitude, of being primarily

Admitting the agreement into evidence might spawn the related disadvantage to the nonsettling defendant of suggesting to the jury that the plaintiff and the settling defendants are expecting a certain recovery. In fact, such an agreement indicates that the settling parties are so sure that the jury will return a verdict for a certain amount they are willing to guarantee it. Informing the jury of "the settling parties' expectation of a substantial verdict . . . will tend to make this expectation a self fulfilling prophecy."[169]

The final and most costly disadvantage to the nonsettling defendant is that a sliding scale settlement which meets the requirements of good faith destroys his right to partial indemnity from his co-defendants. The settlement may allow the nonsettling parties to escape the judgment free of charge; there is no right to cross-claim for partial indemnity and the nonsettling party may pay the entire verdict regardless of her degree of fault.[170]

B. Legislative Intent Behind Section 877.5

The sliding scale statute enacted by the California Legislature—section 877.5 of the California Code of Civil Procedure—expressly addressed only the issue of the secrecy of the agreements, leaving open the issue of good faith.[171] Some courts have read the statute quite narrowly. For example, in *Imperial Spa, Inc. v. Superior Court*[172] the court reasoned that in approving sliding scale agreements the legislature clearly rejected the requirement of proportionality for the good faith of such settlements.[173] In contrast, the court in *Torres v. Union Pacific Railroad*

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responsible for the injury and of being most financially able to pay the judgment. *Id. See* Northern Ind. Pub. Serv. Co. v. Otis, 145 Ind. App. 159, 169-70, 250 N.E.2d 378, 386 (1969). One author suggests that this problem can be avoided merely by excising any inculpating statements except those absolutely necessary to an understanding of the agreement prior to its submission into evidence. Comment, *supra* note 86, at 766-67.

169. Thornton & Wicke, *supra* note 161, at 234.

170. Note, *"Mary Carter" Limitation on Liability Agreements Between Adversary Parties: A Painted Lady is Exposed*, 28 U. MIAMI L. REV. 988 (1973-74). The author there suggests: "The salient feature of a Mary Carter agreement is the incentive provision whereby the signing defendant may decrease the dollar amount of his liability by increasing the dollar amount of his co-defendants' liability." *Id.* at 989.

171. *See* CAL. CIV. PROC. CODE § 877.5 (West 1980); *see supra* notes 94-98 and accompanying text.

172. 205 Cal. Rptr. 337 (1984) (ordered depublished).

173. *Id.* at 351. The *Imperial Spa* court also rejected the decision in Torres v. Union Pac. R.R., 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984). *Id.* Thus, it appears that the court was speaking of the reasonable range test when they referred to proportionality. See also Young v. Lane Realty, 158 Cal. Rptr. 71 (1979) (ordered depublished), in which one concurring opinion states that the only good faith requirement for sliding scale agreements under § 877.5 is disclosure to the court. *Young*, 158 Cal. Rptr. at 78 (Paras, J., concurring).

Co.,[174] held that the sliding scale statute compelled a good faith test which considered as a factor the relationship between the settlement price and the settling party's fair share of liability.[175] These conflicting interpretations illustrate the need to explore what, if any, good faith definition the legislature had in mind for agreements covered by the statute. This section will explore available evidence concerning the legislative motives behind section 877.5.

1. Plain meaning

There is no evidence and no case authority to suggest that sliding scale agreements are exempt from good faith requirements.[176] An overview of the context in which the statute was enacted clearly indicates that the legislature did intend such a requirement. First, section 877.5 was placed among the other good faith statutes.[177] Section 877 is the statute which discusses the consequences of a good faith settlement.[178] Section 877.6 discusses the proper procedure for determining the good faith of a pretrial settlement between a joint tortfeasor and a plaintiff.[179] This raises the inference that the legislature placed the sliding scale statute among the other good faith statutes because it is a good faith statute itself.

More importantly, at the time the legislature passed this legislation the good faith requirement applied to all settlements which released one joint tortfeasor from liability for contribution to a co-joint tortfeasor.[180] In enacting section 877.5, the legislature did not abrogate this existing requirement. Had it intended to change the state of the law, it seems likely the legislature would have clearly expressed this intent.

Conversely, the language of the statute supports the conclusion that the legislature did not intend to alter existing law.[181] Section 877.5 merely adds a disclosure requirement in sliding scale cases to the good faith standard releasing any joint tortfeasor from liability.

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174. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

175. *Id.* at 507, 203 Cal. Rptr. at 831.

176. *See supra* note 107.

177. The recent opinion in Riverside Steel Constr. Co. v. William H. Simpson Constr. Co., 171 Cal. App. 3d 781, 217 Cal. Rptr. 569 (1985) suggests that the legislature erred in placing this statute among the contribution statutes. *Id.* at 796, 217 Cal. Rptr. at 578.

178. *See supra* notes 25-27 and accompanying text.

179. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986).

180. *Id.* § 877. *See* River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972).

181. *See In re* Marriage of Bouquet, 16 Cal. 3d 583, 587-90, 546 P.2d 1371, 1373-74, 128 Cal. Rptr. 427, 429-30 (1976) (discussing statutory construction).

2. Legislative history

Support for this conclusion comes from available legislative history pertaining to section 877.5. The Legislative Counsel Digest[182] initially refers to the fact that in tort actions involving multiple defendants, a plaintiff may arrange a settlement with some, but not all of the tortfeasors, which limits the liability of the settling defendants thereby affecting the liability of the nonsettling defendants. The Digest focused on the concern that these agreements were not required to be revealed to the court or to the jury in a subsequent trial.[183] Thus, it appears that the legislature's sole intent was to remedy the unfairness caused by the secretive nature of sliding scale agreements.[184]

Furthermore, in analyzing the potential effects of section 877.5 in its bill form—A.B. 1275[185]—the Assembly Committee on the Judiciary quoted generously from *River Garden Farms, Inc. v. Superior Court.*[186] In particular, the Committee's Bill Digest points to specific language in that case: " 'The major goals of the 1957 tort contribution legislation are, *first, equitable sharing* of costs among the parties at fault, and *second*, encouragement of settlements.' "[187] This legislative documentation thus

182. Cal. A.B. 1275, 1977-78 Reg. Sess. (1977) (Legislative Counsel's Digest).

183. *Id.*

184. This would correspond with what several other jurisdictions had done regarding sliding scale settlements. *See supra* note 86.

185. Cal. A.B. 1275, 1977-78 Reg. Sess. (1977) (codified at CAL. CIV. PROC. CODE § 877.5 (West 1980)).

186. *Settlement of Suits: Bill Digest on AB 1275 Before Assembly Comm. on Judiciary*, 1977-78 Reg. Sess. (1977) (unpublished Report) (hearing date: May 12, 1977) (copy on file at *Loyola of Los Angeles Law Review*) [hereinafter cited as *Assembly Comm. Report*].

187. *Id.* at 1 (quoting *River Garden Farms*, 26 Cal. App. 3d at 993-94, 103 Cal. Rptr. at 503) (emphasis added). The Digest continues:

> "Auxiliary to the latter is some assurance of settlement finality. Because the statute limits contribution to the judgment debtors, the concept of equitable sharing stops far short of equal sharing. . . . Each prejudgment settlement affects the ultimate expense borne by each judgment debtor. Absent a prejudgment settlement, all defendants found liable would share pro rata, that is, equally. By settling before verdict, one defendant may acquit himself by contributing something less than his equal share, leaving the other defendants saddled with the settlement, the smaller the pro tanto credit for the settlement. The cheaper the settlement, the smaller the pro tanto credit. Thus a nonnegotiating defendant has a palpable financial interest in the amount at which the negotiating defendant settles.
>
> The California legislation empowers a plaintiff, armed with a strong and lucrative claim, to settle with his antagonists one by one, preserving for the jury the opponent with the most money and least sympathy. The power is great and vulnerable to abuse. In a multi-party case the threat of an unshared judgment against the last remaining defendant—diminished only by meager settlements with his eager fellows—permits a plaintiff to create acute financial pressures bordering on extortion. Viewed as a demand for settlements which have a *reasonable relation* to the value of the plaintiff's case, to the strengths and weaknesses of the parties and the financial ability of the settlor, *the good faith clause aids the statutory goal of equitable sharing.*

refutes any speculation that A.B. 1275 was intended to abrogate the existing good faith requirements for settlements involving multiple defendants, or that *River Garden Farms* is inapplicable to sliding scale settlements.[188]

3. Which good faith test does section 877.5 envision?

Assuming that section 877.5 does require good faith, the question remains as to which good faith test the legislature contemplated.

At the time A.B. 1275 was passed, competing definitions of good faith existed. The courts in *River Garden Farms, Inc. v. Superior Court*[189] and *Lareau v. Southern Pacific Transportation Co.*[190] had enunciated a reasonable range test. However, *Stambaugh v. Superior Court*[191] had suggested that the appropriate test for good faith was the tortious conduct test. *Stambaugh* did not replace *River Garden Farms* nor *Lareau*, it merely disagreed with them. In other words, the definition of good faith was unclear at the time the legislation was enacted.

The Assembly Judiciary Committee's Bill Digest suggests that the Legislature specifically contemplated a reasonable range test. Quoting directly from *River Garden Farms*, the Digest states that " '[v]iewed as a demand for settlements which have a reasonable relation to the value of the plaintiff's case . . . the good faith clause aids the statutory goal of equitable sharing.' "[192] Because this legislative material never refers to the tortious conduct test, the inference arises that the legislature contemplated a reasonable range test for good faith.

Therefore, it appears certain that section 877.5 was intended to impose good faith requirements upon sliding scale settlements and that the

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It also aids the goal of settlement, by preventing a plaintiff from selecting one defendant as the target for enlarged demands after unreasonably low settlements with others."

Id. at 1-3 (quoting *River Garden Farms*, 26 Cal. App. 3d at 993-94, 103 Cal. Rptr. at 503-04) (emphasis added by author).

188. This assertion was made in the initial appellate opinion in City of Los Angeles v. Superior Court, 160 Cal. App. 3d 489, 497, 206 Cal. Rptr. 674, 680 (1984), *vacated and remanded*, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986) (remanded for further factual findings on good faith issues).

189. 26 Cal. App. 3d 986, 103 Cal. Rptr. 498 (1972). *See supra* notes 41-47 and accompanying text.

190. 44 Cal. App. 3d 783, 118 Cal. Rptr. 837 (1975). *See supra* notes 48-51 and accompanying text.

191. 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976), *disapproved by inference*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985) (disapproving cases which employed tortious conduct test similar to that employed in *Stambaugh*). *See supra* notes 56-62 and accompanying text.

192. *Assembly Comm. Report, supra* note 186, at 2.

test contemplated was most probably the reasonable range test articulated in *River Garden Farms.*

C. *How Should Good Faith be Defined?*

1. A rejection of the tortius conduct test

In discussing the competing definitions of good faith, it is important to keep in mind the goals motivating the enactment of the 1957 tort contribution statutes. Those goals were, first, equitable allocation of fault, and second, encouragement of settlement.[193] Because the amount of a good faith settlement is deducted from an ultimate judgment rendered against the nonsettling parties,[194] the goal of equitable sharing of costs is served only when the amount of the settlement bears a reasonable relation to the fair share of the settling party's potential liability. Equitable sharing of costs is not served when the settlement amount deducted is egregiously disproportionate to the settling defendant's fair share of potential liability. Yet this result is promoted by the tortious conduct test which requires only that, in negotiating a settlement, the settling parties refrain from tortious or collusive conduct with respect to the nonsettling parties.[195] Because this analysis ignores the goal of equitable sharing of costs and unfairly burdens a nonsettling party, the tortious conduct test must be rejected.[196]

2. The reasonable range test of *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*

In *Tech-Bilt, Inc. v. Woodward-Clyde & Associates,*[197] the California Supreme Court for the first time considered the definition of good faith for settlement agreements where multiple defendants were involved. In rejecting the tortious conduct test enunciated in *Stambaugh v. Superior*

193. *Id.* at 1.

194. *See* CAL. CIV. PROC. CODE § 877 (West 1980).

195. *See, e.g.*, Cardio Sys. Inc. v. Superior Court, 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981), *disapproved*, Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 500 n.7, 698 P.2d 159, 167 n.7, 213 Cal. Rptr. 256, 264 n.7 (1985). See *infra* notes 224-27 and accompanying text for a discussion of *Cardio.* For an application of this reasoning in the context of sliding scale agreements, see Burlington N.R.R. v. Superior Court, 137 Cal. App. 3d 942, 946-47, 187 Cal. Rptr. 376, 378-79 (1982), *disapproved; Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7.

196. The tortious conduct test was rejected by the California Supreme Court in *Tech-Bilt*, 38 Cal. 3d at 498, 698 P.2d at 166, 213 Cal. Rptr. at 263. *See infra* notes 198-209 and accompanying text.

197. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

Court,[198] the *Tech-Bilt* court held that "[a] more appropriate definition of 'good faith' . . . would enable the trial court to inquire, among other things, whether the amount of the settlement is within *the reasonable range* of the settling tortfeasor's proportional share of comparative liability for the plaintiff's injuries."[199] The court considered the two primary policies underlying the good faith statutes: (1) the encouragement of settlements and (2) the equitable allocation of costs among multiple tortfeasors.[200] It concluded that neither policy would be served by an approach which emphasized one goal to the virtual exclusion of the other. The tortious conduct test, as explained by the court, produced such a result.[201]

The *Tech-Bilt* reasonable range test does not require that a settlement be strictly proportionate to the settling party's fair share of liability. Rather, the test embraced by the court was similar to the one envisioned in *Torres v. Union Pacific Railroad Co.*,[202] which specifically addressed the good faith of a sliding scale settlement.[203] In approving this settlement, the *Torres* court concluded that in order to meet statutory good faith requirements such settlements could "not be grossly disproportionate to what a reasonable person, at the time of the settlement, would estimate the settling defendant's liability to be."[204] Embracing this language, the *Tech-Bilt* court placed the burden on the party asserting the lack of good faith to demonstrate that the settlement is so far "out of the ballpark" that it is inconsistent with the equitable objectives of the statute.[205] Accordingly, in order to be within the reasonable range, a settlement need not be proportionate to potential liability, but need only be "somewhere in the ballpark."

Since the agreement examined in *Tech-Bilt* was not a sliding scale settlement, the question arises whether the court's holding in that case is applicable to such agreements. The broad policies underlying the *Tech-Bilt* decision indicate that it should extend to all pretrial settlements in

198. 62 Cal. App. 3d 231, 132 Cal. Rptr. 843 (1976), *disapproved by inference, Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7.

199. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (emphasis added). *See supra* notes 64-72 and accompanying text.

200. 38 Cal. 3d at 498, 698 P.2d at 166, 213 Cal. Rptr. at 263.

201. *Id.* The court cited Professor Roberts, who suggested that the tortious conduct test emphasized the goal of encouraging settlements to the virtual exclusion of the goal of equitable sharing of costs. Roberts, *supra* note 39, at 898.

202. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984). *See supra* notes 52-55 and accompanying text.

203. 157 Cal. App. 3d at 503-10, 203 Cal. Rptr. at 828-33.

204. *Id.* at 509, 203 Cal. Rptr. at 832.

205. *Tech-Bilt*, 38 Cal. 3d at 500-01, 698 P.2d at 167, 213 Cal. Rptr. at 264.

cases involving multiple tortfeasors. The supreme court in *Tech-Bilt* enunciated a general definition of "good faith" in the context of pretrial settlements. It did not distinguish between types of agreements nor did it limit its holding to only those agreements similar in terms to the one before it.

Furthermore, in *Tech-Bilt*, the supreme court specifically "disapproved" two cases which employed a tortious conduct analysis to determine the good faith of sliding scale agreements.[206] Had the court intended to exclude sliding scale settlements from its holding, it could have refrained from reversing cases that arose from such agreements.

Finally, in conjunction with its decision in *Tech-Bilt*, the supreme court remanded several sliding scale cases to the appellate court that had previously been accepted for hearings.[207] It ordered the appellate courts to reconsider their decisions in light of the applicability of the principles enunciated in *Tech-Bilt*. This action, read together with the court's rejection of *Dompeling v. Superior Court*,[208] and *Burlington Northern Railroad Co. v. Superior Court*,[209] indicates that the court intended lower courts to apply a reasonable range analysis to sliding scale settlements.

D. Creating a Workable Reasonable Range Test to Determine the Good Faith of Sliding Scale Settlements

The California Supreme Court's decision in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*[210] settled one controversy but generated another. The court adopted a general definition of good faith without specifying the structure a settlement must take in order to comply with its definition. This section will discuss the difficulties which arise in determining whether a sliding scale settlement is in good faith and will propose guidelines for the court in making these determinations.

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206. *Id.* at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7 (disapproving Dompeling v. Superior Court, 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981) and Burlington N.R.R. v. Superior Court, 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982)).

207. Abbott Ford Inc. v. Superior Court, 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985); City of Los Angeles v. Superior Court, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986), *vacating and remanding* 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (1984).

208. 117 Cal. App. 3d 798, 173 Cal. Rptr. 38 (1981), *disapproved, Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7.

209. 137 Cal. App. 3d 942, 187 Cal. Rptr. 376 (1982), *disapproved, Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7.

210. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). See *supra* notes 64-72 & 198-205 and accompanying text for a discussion of *Tech-Bilt*.

1. Practicality of a reasonable range test

A few cases and certain commentators have addressed the issue of how a court, mechanically, could determine if a settlement was within the "reasonable range" of a settling party's potential liability before a verdict has ever been rendered. The court in *River Garden Farms, Inc. v. Superior Court* suggested, and the *Tech-Bilt* court agreed, that " 'price levels are not as unpredictable as one might suppose. . . . [G]eneralized valuation criteria are recognized by the personal injury bar . . . and [by] pretrial settlement courts.' "[211] These courts concluded that, prior to a trial on liability, reliable estimates of the value of a claim and the degree of culpability of each tortfeasor can be made. Therefore, a reasonable range can be established prior to trial.[212]

The court in *Torres v. Union Pacific Railroad Co.*[213] took an even more flexible view of the practical problems involved in making such a determination prior to trial. The court suggested that the value the jury ultimately assigns to the claim against a settling party should not be used in determining the reasonable range.[214] The court reasoned that a defendant may in good faith believe that his liability is less than the jury ultimately determines it to be. It adopted a test whereby the settlement figure "must not be grossly disproportionate to what a reasonable man, *at the time of the settlement*, would estimate the settling defendant's liability to be."[215] The *Torres* court would rely on the liability estimates of plaintiffs and defendants who are likely to have little experience making such determinations.

One commentator has proposed a minor adjustment to the reason-

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211. *Tech-Bilt*, 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264 (quoting River Garden Farms, Inc. v. Superior Court, 26 Cal. App. 3d 986, 998, 103 Cal. Rptr. 498, 506 (1972)). One commentator has suggested:

> Some litigators may point to the apparent difficulty of predicting percentages of ultimate responsibility at the pretrial stage as a major drawback to granting proportional effect to settlements. Both the percentages of responsibility and the probable amount of plaintiff's damages must be determined before a fair value can be set. However, as experienced trial lawyers know, both the plaintiff's bar and the defendant's bar have been making such 'informed guesses' for years. The trial bar's unflagging resort to settlements has produced highly refined techniques that make actual litigation still a matter of last resort.

Adams, *Settlement After* Li: *But is it "Fair"?*, 10 PAC. L.J. 729, 747-48 (1979). Adams noted that seminars are run continually, discussing the valuation of claims and settlements prior to trial, and also suggested other sources of guidance. *Id.* at 747-48 nn.17-18. *See also River Garden Farms*, 26 Cal. App. 3d at 998 n.9, 103 Cal. Rptr. at 506 n.9.

212. This is important to the settling defendant who wants to be certain that his settlement will hold regardless of what is subsequently decided at trial.

213. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

214. *Id.* at 509, 203 Cal. Rptr. at 832.

215. *Id.* (emphasis added).

able range test set forth in *Torres* by suggesting it would work better as a "reasonable judge" test.[216] Through their experience, judges can make rough estimates of a plaintiff's probable recovery and a defendant's degree of fault. The commentator reasoned that defendants, anxious to have their settlements approved (thus insulating them from cross-claims for partial indemnity) would compile the evidence necessary to illustrate that their settlements meet reasonable range requirements. Moreover, the nonsettling defendants, concerned with protecting their right to partial indemnity, would produce evidence to the contrary.[217] As a result, the judge would possess sufficient information to estimate whether a settlement survived a reasonable range analysis.

In her lone dissent in *Tech-Bilt*, Chief Justice Bird argued that employing a reasonable range test is impractical. The Chief Justice feared that forcing judges to determine, prior to trial, whether settlements are within a reasonable range of the settling party's fair share of potential liability "will clog our trial courts with unnecessary hearings," placing an intolerable burden upon them.[218] According to the Chief Justice, it is unworkable and inefficient to force trial judges to determine the value of a plaintiff's claim, assess the degree of each defendant's fault, and consider other factors which might be germane to a reasonable range analysis, all prior to trial.[219]

Although the Chief Justice expressed a legitimate concern, this problem does not compel the adoption of a test for good faith which completely ignores the respective liabilities of the parties. Courts have consistently identified equitable sharing of costs as one of the two primary goals behind the California tort contribution acts.[220] This policy has been set by the legislature and it is unacceptable for a court to announce that it does not have the time to properly enforce the law.

More importantly, courts previously employing a reasonable range analysis have been able to do so without encountering insurmountable obstacles. These courts have followed a practical approach considering such factors as the evidence of the liability of the parties,[221] the testimony

216. *See* Roberts, *supra* note 39, at 922-23.

217. *Id.*

218. *Tech-Bilt*, 38 Cal. 3d at 502, 698 P.2d at 168, 213 Cal. Rptr. at 265 (Bird, C.J., dissenting).

219. *Id.* at 505-06, 698 P.2d at 171, 213 Cal. Rptr. at 268 (Bird, C.J., dissenting).

220. *Id.* at 494, 698 P.2d at 163, 213 Cal. Rptr. at 260 (citing *River Garden Farms*, 26 Cal. App. 3d at 993, 103 Cal. Rptr. at 503).

221. Dompeling v. Superior Court, 117 Cal. App. 3d 798, 807, 173 Cal. Rptr. 38, 43 (1981), *disapproved, Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal Rptr. at 264 n.7. Although the *Dompeling* court embraced the tortious conduct test, it proceeded to state that

of witnesses evaluating the value of the case[222] and the experience of the presiding judge.[223] In *Cardio Systems, Inc. v. Superior Court*,[224] for example, the trial court employed a reasonable range analysis to determine the good faith of a pretrial settlement.[225] In *Cardio*, the plaintiffs were the wife and children of a man who died during open heart surgery. They sued the hospital and Cardio Systems, the distributor of a heart-lung pump machine which was a contributing factor in the man's death.[226] The plaintiffs settled with Cardio Systems for the minimal consideration of a waiver of costs. The plaintiffs then settled with the hospital for $1,000,000. The hospital filed a cross-complaint against Cardio Systems for partial indemnity. Cardio claimed that its settlement with the plaintiff was in good faith, thus insulating it from any liability to its co-defendant. In determining that the settlement price *did not* bear a reasonable relationship to the settling party's fair share of potential liability, the trial court—which was subsequently reversed—considered evidence presented as to liability and evaluation of damages.[227]

Each court employing a reasonable range analysis faced the same problems courts would face today: estimation of a defendant's ultimate liability prior to trial. All were able to make such a determination and there is no reason to expect that judges today could not accomplish this task just as efficiently under the reasonable range test mandated by *Tech-Bilt*.[228] A good faith hearing need not be as cumbersome as Chief Justice Bird suggests. A judge may make his determination on the basis of affi-

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the settlement in question was not " 'unreasonably cheap' " in light of the plaintiff's total settlement request. *Id.*

222. Cardio Sys., Inc. v. Superior Court, 122 Cal. App. 3d 880, 883-84, 176 Cal. Rptr. 254, 256 (1981), *disapproved, Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7. *See also* Widson v. International Harvester Co., 153 Cal. App. 3d 45, 58, 200 Cal. Rptr. 136, 145 (1984).

223. Kohn v. Superior Court, 142 Cal. App. 3d 323, 328, 191 Cal. Rptr. 78, 82 (1983), *disapproved by inference, Tech-Bilt*, 38 Cal. 3d at 500 n.7, 698 P.2d at 167 n.7, 213 Cal. Rptr. at 264 n.7. Although the *Kohn* court embraced a tortious conduct approach, it approved the trial court's good faith determination using reasonable range standards. *Id.*

224. 122 Cal. App. 3d 880, 176 Cal. Rptr. 254 (1981).

225. *Id.* at 886, 176 Cal. Rptr. at 257.

226. *Id.* at 882, 176 Cal. Rptr. at 255.

227. *Id.* at 883-84, 176 Cal. Rptr. at 256. It is significant that the *Cardio* court, which reluctantly reversed the trial court on appeal, noted the unfairness of the settlement. The hospital lost its right to partial indemnity against Cardio Systems merely because Cardio Systems and the plaintiff had negotiated an agreement allowing Cardio Systems to settle for much less than its potential liability. As a result, the hospital was required to shoulder the burden for almost the entire verdict. *Id.* at 890-91, 176 Cal. Rptr. at 260.

228. For a discussion of the reasonable range test in operation, see Roberts, *supra* note 39, at 924-28.

davits alone. No oral testimony is required by the statute.[229]

2. Factors to be considered in a reasonable range analysis

Beginning with the earliest decisions on good faith, the courts have struggled to determine what factors to consider in a reasonable range analysis.[230] They have recognized that the goal of encouraging settlements will, in most cases, require that a settlement be lower than what the tortfeasor would expect to pay if he went to trial and lost.[231] Courts have also recognized the difficulties in computing a reasonable range because most cases permit only a rough assessment of value in advance of a trial.[232]

Courts using the reasonable range test do not require that settlements equal what the settlor would have paid had he gone to trial and lost. As the *Torres* court stated, "any moderate disparity between a defendant's settlement price and his fair share of the damages will be tolerated . . . . In some cases, however, the disparity between what was paid and what is fair will be so egregious as to constitute bad faith . . . ."[233] Courts should therefore employ a definition of reasonable range which balances the goals of equitable sharing of costs and encouraging settlement of litigation. This section will discuss the factors courts should consider in determining whether a sliding scale settlement is within the reasonable range of the settling party's potential liability.

a. minimum contribution

The good faith requirement, as enunciated by the supreme court in *Tech-Bilt*, should bar any sliding scale settlement that allows a tortfeasor to shield himself from a cross-claim for partial indemnity and still escape the suit without contributing to a final judgment.[234] Accordingly, courts should require defendants entering into sliding scale settlements to contribute to any judgment ultimately rendered an amount within their reasonable range of potential liability. If a settling defendant is allowed to escape the action without contributing at all to the ultimate award, the remaining defendant, though only partially at fault, would be required to

229. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986).

230. See *supra* notes 41-55 and accompanying text discussing the reasonable range test for good faith.

231. *Torres*, 157 Cal. App. 3d at 506, 203 Cal. Rptr. at 830.

232. *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506. *Cf.* Adams, *supra* note 211, at 747-48.

233. *Torres*, 157 Cal. App. 3d at 506, 203 Cal. Rptr. at 830.

234. For examples, see *supra* notes 76, 110-11 & 141-48 and accompanying text for a discussion of the agreements in *Burlington Northern, Riverside Steel* and *City of Los Angeles.*

pay the entire award. Recognizing the dual goals of the tort contribution statutes, the *Tech-Bilt* court stated that these policies "would be disserved by an approach which emphasizes one to the virtual exclusion of the other."[235] A sliding scale settlement with no unconditional minimum contribution requirement is precisely the type of agreement which emphasizes the goal of encouraging settlement to the exclusion of the goal of equitable sharing of costs.[236]

Sliding scale agreements which do ensure that the settling party will contribute an amount within the reasonable range of his fair share of potential liability promote the policy of equitable sharing of costs. Under California Code of Civil Procedure section 877 the amount of the settlement will be deducted from the damage award against the remaining defendant.[237] If the settlement meets the reasonable range test the remaining defendant, after deducting the settlement from a judgment rendered against him, will be paying a sum reasonably related to his fair share of liability.

One court has suggested that the present value of a sliding scale settlement be considered in determining whether the agreement is within the reasonable range of the settlor's potential liability. In *Riverside Steel Construction Co. v. William H. Simpson Construction Co.*,[238] a case decided after *Tech-Bilt*, the court of appeal rejected the proposition that sliding scale settlements, to be in good faith, require a minimum contribution by the settling defendant. The court reasoned that a guarantee to the plaintiff of a certain recovery had a present value similar to that of an insurance policy which could bring the settlement amount within the reasonable range of the settling party's fair share of liability.[239]

The *Riverside Steel* court reasoned that a strict minimum contribu-

235. *Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263 (citing Roberts, *supra* note 39, at 899).

236. This type of an agreement encourages settlement by providing the settling defendant a possibility of escaping the action without contributing to the final judgment. Yet it ignores the goal of equitable allocation of cost. Under California Code of Civil Procedure § 877, the amount of a good faith settlement is subtracted from any judgment rendered against the remaining defendants. CAL. CIV. PROC. CODE § 877 (West 1980). By requiring the settlement price to be within a reasonable range of the settling party's fair share of liability, the code ensures that the remaining defendants are not unduly burdened by paying a disproportionate share of the damage award. However, when a settling defendant can escape the action without any payment, there is nothing to deduct from the ultimate verdict and the nonsettling defendant unjustly pays more than her share of the fault.

237. CAL. CIV. PROC. CODE § 877 (West 1980).

238. 171 Cal. App. 3d 781, 217 Cal. Rptr. 569 (1985). *See supra* notes 109-18 and accompanying text.

239. *Id.* at 794-95, 217 Cal. Rptr. at 577. See *infra* notes 267-76 and accompanying text for a discussion of the minimum contribution concept and its place in a reasonable range analysis.

tion requirement would render sliding scale settlements valueless to the settling parties.[240] This might be true if the minimum contribution test is one of "strict proportionality," in which case the minimum payment would have to equal the settling party's fair share of liability. Under such a test it would make no sense for a joint tortfeasor to settle whether it be a straight settlement or a sliding scale settlement. Under a reasonable range test, however, several factors are considered[241] which would allow the minimum contribution to fall below the settling party's actual proportionate share of liability. Because the party could still settle for less than he would pay if found liable at a trial, sliding scale settlements would still be of some value to defendants in suits with multiple defendants.

The *Riverside Steel* court's analysis is not without merit. Because of the structure of sliding scale settlements, the settling defendant usually would guarantee the plaintiff an amount far in excess of his potential liability. Considering the requirement that a minimum contribution be reasonably related to the settlor's potential liability, the settlor would be foolish to also guarantee an amount significantly higher. It appears the settling party generally would be better off with a straight settlement. However, this is not necessarily so. The settling defendant could structure the sliding scale settlement so as to require an upward cap governing what he ultimately might be required to pay, which would still be lower than what he might expect to pay at a trial.[242]

An example of a sliding scale settlement consistent with this proposal and consistent with the dictates of *Tech-Bilt* is the agreement upheld in *Torres v. Union Pacific Railroad Co.*[243] In *Torres*, the plaintiff and one defendant negotiated a sliding scale settlement with a guarantee amount of $200,000. Fifty thousand dollars of this was an outright settlement which the plaintiff could keep regardless of what he recovered against the

240. 171 Cal. App. 3d at 795-96, 217 Cal. Rptr. at 577.

241. *See infra* notes 248-54 and accompanying text.

242. For example, assume that the settling party estimates its liability at $250,000 in an action worth approximately $1,000,000 to the plaintiff. Concluding an agreement requiring a minimum contribution of $250,000 in addition to a $1,000,000 guarantee would be ludicrous from the settling party's perspective. However, using a reasonable range analysis it is conceivable that a court might approve a settlement of $125,000 as a good faith settlement. The settling party could thus agree to contribute $125,000 and be liable for an additional $50,000 depending on the outcome of the litigation with the remaining defendants. In larger suits there would be even more room in which to structure such a sliding scale.

On the other hand, one author, without specifically rejecting the idea of a minimum contribution, opined that sliding scale settlements could not meet the dictates of good faith in California, whatever the specific form. Wesierski, *Mary Carter Agreements And Good Faith Settlements—Are They Both Possible In California?*, 48 INS. COUNS. J. 639, 648 (1981).

243. 157 Cal. App. 3d 499, 203 Cal. Rptr. 825 (1984).

remaining defendant at the trial.[244] Under Code of Civil Procedure section 877, this $50,000 would be deducted from any judgment ultimately rendered against the remaining defendant.[245] Since the court determined that $50,000 was within the reasonable range of the settling defendant's fair share of liability, the nonsettling defendant would not be forced to pay egregiously more than his degree of fault compelled. This is much more equitable than the zero contribution requirement approved in *Riverside Steel*,[246] in which the nonsettling defendant might be forced to pay the entire verdict despite the fact he is only partially at fault.

The *Torres* case illustrates that a good faith test requiring an actual minimum contribution encourages equitable apportionment of liability without stifling the incentive to settle. Defendants seeking an end to litigation at a price less than they would have paid had they lost at trial will still settle out of court, as did the defendant in *Torres*.[247] Since both defendants in *Torres* ultimately settled, the case also indicates that a minimum contribution requirement does not necessarily deter total settlement of a suit. Finally, the *Torres* case supports the proposition that a trial court can hear evidence and make a judgment as to whether a settlement is within a defendant's fair share of liability even though the case has not yet been tried.

b. other factors

Courts should consider several additional factors when determining whether a minimum contribution falls within the reasonable range of the settling defendant's fair share of liability. First, courts will have to determine the plaintiff's potential recovery and estimate what portion of that recovery the settling tortfeasor would be held responsible for had he gone to trial. The court should then employ a discount factor so that the settlement is allowed to fall sufficiently below the defendant's proportionate liability to maintain the attractiveness to defendants to settle prior to trial.[248] As the *Torres* court stated, any "moderate disparity" between the settlement amount and the actual liability will be tolerated.[249]

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244. *Id.* at 503, 203 Cal. Rptr. at 828.

245. CAL. CIV. PROC. CODE § 877 (West 1980).

246. *See supra* notes 109-26 and accompanying text.

247. One might speculate that this minimum contribution would induce the nonsettling party to take his chances at trial knowing that at least the minimum contribution will be deducted from any verdict against him. However, this is not necessarily so. In the *Torres* case, both parties ultimately settled. *Torres*, 157 Cal. App. 3d at 503, 203 Cal. Rptr. at 828. Thus, the minimum contribution did not impede total settlement of the suit.

248. *See* Roberts, *supra* note 39, at 920.

249. *Torres*, 157 Cal. App. 3d at 507, 203 Cal. Rptr. at 830. See also *River Garden Farms, Inc. v. Superior Court*, where the court stated, "[w]hen one tortfeasor chooses to settle and

The *Tech-Bilt* court mentioned factors which might also be considered in a good faith determination. It recognized that disproportionately low settlement figures are often reasonable in the case of relatively insolvent or underinsured tortfeasors.[250] Although allowing an insolvent or underinsured tortfeasor to settle for an amount substantially below his share of liability shifts an otherwise unacceptable proportion of the verdict to the nonsettling defendant, it is a practical consideration which should not be ignored. Because his co-defendant is insolvent, the nonsettling party's right to partial indemnity is of limited value. Abrogating it does not egregiously offend the goal of equitable sharing of costs.[251]

Judges might also consider the skills of the attorneys on both sides because this will affect the judges' evaluation of the plaintiff's recovery and the likely proportion of damages for which the settling defendant might be held liable at trial.

The inclusion of some of these factors might circumvent the purpose of the reasonable range test. *Tech-Bilt* rejected the tortious conduct test because it cut off one tortfeasor's right to partial indemnity while exposing him to liability for a judgment grossly disproportionate to his fair share of liability. If, under the reasonable range test, judges are permitted to make subjective decisions on a host of factors that make lower settlements look reasonable, once again the goal of equitable allocation of costs will be adversely affected.

However, keeping in mind the value of pretrial settlements to certain plaintiffs[252] and the circumstances under which many are negotiated,[253] settlements should not be made so unattractive as to dissuade

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another chooses to litigate, inequality in the ultimate cost does not signalize bad faith." *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

250. *Tech-Bilt*, 38 Cal. 3 at 499, 698 P.2d at 166, 213 Cal. Rptr. at 263. If the court considers the solvency of a tortfeasor in its good faith determination certain discovery problems arise. California discovery rules place restrictions on the purposes for which a party's financial condition may be discovered. If financial condition is to be considered in a reasonable range analysis, the courts will be compelled to allow discovery to ascertain the true state of the settling party's financial condition. For a comprehensive discussion of this issue, see F. Roberts, The Financial Condition and Insurance Policy Limits of a Joint Tortfeasor Wishing to Settle in Good Faith: Problems of Discovery and Confidentiality, (Oct. 1985) (unpublished manuscript) (to be published in 25 SANTA CLARA L. REV.).

251. For a discussion of indemnity issues where one tortfeasor is insolvent or underinsured, see Zavos, *Comparative Fault and the Insolvent Defendant: A Critique and Amplification of* American Motorcycle Association v. Superior Court, 14 LOY. L.A.L. REV. 775, 817-31 (1981); Myse, *The Problem of the Insolvent Contributor*, 60 MARQ. L. REV. 891, 898-905 (1976-77).

252. See *supra* notes 160-63 and accompanying text discussing the benefits of sliding scale settlements.

253. Situations may arise where several defendants are cooperative during settlement negotiations but one or more defendants are not willing to settle. Those not wishing to settle may

parties from pursuing them. As the court in *River Garden Farms* stated: "When one tortfeasor chooses to litigate, inequality in the ultimate settlement does not signalize bad faith."[254] Just as the tortious conduct test is unfair because it completely ignores and undermines a joint tortfeasor's right to partial indemnity, a reasonable range test which ignores the plaintiff's right to settle would be equally unfair. The courts should not fashion a test which extinguishes the benefits both defendants and plaintiffs would obtain from settling. The factors enumerated above, while not solving all the problems, balance these competing concerns.

3. Encouraging settlements

A reasonable range test would still provide incentives for a defendant to settle. As mentioned, a settling party would still pay less in a settlement than he would if found liable at a trial. Certain factors would be considered in discounting his settlement price. The incentive is not as strong as it would be under the tortious conduct test. Nevertheless, the reasonable range test is more consistent with the legislative goals of encouraging settlements *and* equitable allocation of costs.

E. An Analysis of the Sliding Scale Agreements in Riverside Steel, Abbott *and* City of Los Angeles *Under a Reasonable Range Test for Good Faith*

The court in *City of Los Angeles v. Superior Court*[255] did not employ a reasonable range analysis to determine good faith. Instead, it returned the case to the trial court for a good faith analysis in keeping with the principles articulated by the supreme court in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*.[256] Meanwhile, the courts in *Riverside Steel Construction Co. v. William H. Simpson Construction Co.*[257] and *Abbott Ford, Inc. v. Superior Court*[258] incorrectly applied the test articulated by

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have valid reasons. However, rules rendering partial settlements void of any benefits at all should be scrutinized carefully. For an example of a situation where one of several defendants in an action refused to seriously negotiate a settlement, see City of Los Angeles v. Superior Court, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986).

254. *River Garden Farms*, 26 Cal. App. 3d at 997, 103 Cal. Rptr. at 506.

255. 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986), *vacating and remanding* 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (1984).

256. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).

257. 171 Cal. App. 3d 781, 217 Cal. Rptr. 569, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985) (opinion to remain published and citable as authority). *See supra* notes 109-26 and accompanying text.

258. 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985) (opinion to remain published and citable as authority). *See supra* notes 127-36 and accompanying text.

the *Tech-Bilt* court and upheld sliding scale settlements which should have been rejected. A brief review of the concurring opinions in the initial *City of Los Angeles v. Superior Court*[259] decision and the opinions in *Riverside Steel* and *Abbott* helps illustrate the deficiencies inherent in many sliding scale settlement agreements.[260]

As the two concurring opinions in *City of Los Angeles* pointed out, there was little ground to assert that the agreement in that case met the requirements of a reasonable range test.[261] Judge Lui found that the sliding scale recovery agreement was "inconsistent with the dictates of *Torres v. Union Pacific R.R. Co.*"[262] He stressed that *Torres* compelled settling defendants who wished to insulate themselves from cross-claims for partial indemnity to make an attempt to place the price of the settlement within a reasonable range of potential liability. He concluded that this settlement did not satisfy that requirement.[263]

Judge Danielson emphatically argued that, "[w]here settling joint tortfeasors concede [as in this case] that a figure of $1,900,000 is not disproportionate to their share of liability, it is difficult to understand how a *zero* payment could be considered as not disproportionate to that same liability."[264] Furthermore, he continued, "[t]o say that $1,900,000 is not disproportionate to the settling defendants' potential liability is not the same as to say that a zero payment would not be disproportionate. In fact, such a zero payment might well be *grossly* disproportionate."[265] He concluded by observing that there is a lack of justice in a rule which permits one defendant to shoulder the entire burden of a judgment resulting from an injury for which two or more defendants were responsible.[266]

The primary argument advanced to justify sliding scale agreements with no unconditional minimum contribution requirement is that the present value of these agreements bring them within a reasonable range

259. 160 Cal. App. 3d 489, 206 Cal. Rptr. 674 (1984), *hrg. granted*, Nov. 21, 1984, *transferred*, Minutes of California Supreme Court, July 18, 1985, 39 Cal. 3d. Advance Sheets, No. 23 (Aug. 22, 1985), at 18 (in light of principles enunciated in *Tech-Bilt), vacated and remanded*, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986).

260. The terms of the agreement in *City of Los Angeles* are set out *supra* in notes 141-48 and accompanying text.

261. See *supra* notes 142-48 and accompanying text discussing the agreement.

262. *City of Los Angeles*, 160 Cal. App. 3d at 500, 206 Cal. Rptr. at 682 (Lui, J., concurring).

263. *Id.* (Lui, J., concurring). This is presumably because the agreement allows the settling defendants to escape the action while paying nothing.

264. *Id.* at 502, 206 Cal. Rptr. at 683 (Danielson, J., concurring) (emphasis added).

265. *Id.* (Danielson, J., concurring) (emphasis added).

266. *Id.* at 503, 206 Cal. Rptr. at 684 (Danielson, J., concurring) (citing W. PROSSER, LAW OF TORTS § 50, at 307 (4th ed. 1971)).

of the settlor's liability. In its brief to the California Supreme Court, one of the settling defendants asserted that the agreement in *City of Los Angeles* met reasonable range standards because of its present value prior to litigation and because of the amount the settling parties may be required to pay out in the future.[267] It based this argument on two grounds. First, it contended that the agreement acted as an insurance policy which protected the plaintiff from the risk of losing at trial.[268] The agreement thus assured the plaintiff at least a minimum recovery. Second, the hospital contended that the value of the agreement was enhanced because it provided substantial immediate relief to a plaintiff who otherwise would be required to wait years for litigation to produce the same result.[269]

Inherent problems surface with the present value contention. To determine whether the value of this "policy" is within the reasonable range of the settling party's fair share of the liability, the judge would need to know the agreement's dollar value. Thus, a system for measuring the present value, in terms of dollars and cents, would have to be devised. If such a system were devised, and the judge could establish the agreement's dollar value, then, to be consistent with *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*,[270] this dollar value would have to be subtracted from the ultimate damage award.[271] A reasonable range test for settlements in multiple tortfeasor cases is only effective if the amount of the settlement is deducted from the award at trial, thus preventing a disproportionate shift of liability to the nonsettling party.[272]

In *Riverside Steel* the court inferred that the sliding scale agreement it analyzed had a present value as an insurance policy which should be considered in determining whether the agreement was within the reason-

267. Brief to California Supreme Court for Appellee Hospital at 13, City of Los Angeles v. Superior Court, No. L.A. 32000 (Cal. S. Ct. filed Oct. 9, 1984), *hrg. granted*, Nov. 21, 1984, *transferred*, Minutes of California Supreme Court, July 18, 1985, 39 Cal. 3d Advance Sheets, No. 23 (Aug. 22, 1985), at 18 (in light of principles enunciated in *Tech-Bilt*), *vacated and remanded*, 176 Cal. App. 3d 856, 222 Cal. Rptr. 562 (1986).

268. The hospital's brief indicated a likelihood that the defendants would prevail at trial. Hospital's Brief, *supra* note 267, at 13.

269. *Id.*

270. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). *See supra* notes 200-01 and accompanying text.

271. This present value could be considered the settling defendants minimum contribution.

272. For example, assume a judge determines that the present value of the sliding scale agreement is within the reasonable range of the settling party's fair share of liability. This present value must be deducted from any judgment rendered against the nonsettling defendants. If it is not, the remaining defendants will be required to pay all the damages for the plaintiff's injuries despite the availability of other potentially liable defendants. This is exactly the kind of situation the contribution statutes, as interpreted by American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), are designed to avoid.

able range of the settling defendant's fair share of liability.[273] Nevertheless, the court failed to resolve the key issue: whether this amount should be deducted from the judgment the nonsettling defendant eventually might have to pay.

Parties should recognize the effect generated when the present value of a settlement is deducted from the final damage award. This insurance policy may come at a cost to them. For example, suppose the plaintiff sues X and Y for a personal injury where total liability equals $40,000. The plaintiff and X negotiate a sliding scale agreement whereby X guarantees the plaintiff a $40,000 recovery and agrees to contribute a $5000 minimum to any damage award. The court then assesses the present value of the agreement as an insurance policy at $1000 and approves it as a good faith settlement.[274] If the jury returned a verdict against Y for $40,000, the $6000 ($5000 + $1000) should be deducted from that verdict.[275] The plaintiff would receive $39,000[276] and, in essence, pay $1000 for his insurance policy. On the other hand, plaintiffs could argue that the value of the agreement as an insurance policy was part of the settlement and should be paid by the settling defendant. This important issue should be addressed in any sliding scale settlement.

Both the *Riverside Steel* and *Abbott* courts rendered decisions approving the good faith of sliding scale agreements in light of the principles enunciated in the *Tech-Bilt* decision. Neither decision, however, appears to take the reasonable range test or the goal of equitable allocation of costs seriously.

In *Riverside Steel*,[277] the court approved a sliding scale agreement even though the settling defendant could potentially escape the action without contributing to any damage award. The court reached this re-

273. *Riverside Steel*, 171 Cal. App. 3d at 794, 217 Cal. Rptr. at 577.

274. Of course, the court would have to determine whether that $6000 was within the reasonable range of X's fair share of liability.

275. The $5000 settlement amount must be deducted from any damage award. CAL. CIV. PROC. CODE § 877 (West 1980). As explained in the immediately preceding section, *see supra* notes 25-26 and accompanying text, this code should be interpreted to compel deduction of the present value from any damage award where that value is included in a reasonable range determination. CAL. CIV. PROC. CODE § 877 (West 1980).

276. The plaintiff would receive $34,000 [40,000 - 6000] from *Y*. Since *X* guaranteed a $40,000 recovery he would be required to pay the $6000 difference between the $40,000 guarantee and the $34,000 paid by *Y*. Because the court determined that the "insurance policy" given by *X* had a $1000 value, *X* could argue he need only pay the plaintiff $5000, reducing plaintiff's cash recovery to $39,000. In cases where the claimed damages were much larger, the value of a sliding scale agreement as an insurance policy would also become much larger. It would be very important to work out who was paying for the plaintiff's "insurance" coverage.

277. *See supra* notes 109-26 and accompanying text.

sult despite its recognition that *Tech-Bilt* and the reasonable range test were applicable to the agreement. The *Riverside Steel* court stated:

> Where . . . a nonsettling defendant is able to prove that the *total value* of a sliding scale recovery agreement . . . is not 'in the ballpark' of the settling defendants proportionate share of liability, and that figure is viewed together with other factors emphasized by the *Tech-Bilt* court, that 'settlement' may be in bad faith.[278]

The *Riverside Steel* court held that sliding scale settlements with no unconditional minimum contribution requirements were not *per se* invalid. It also noted that such agreements had a present value as an insurance policy. The present value, presumably, could bring the settlement within the reasonable range of the settling party's fair share of potential liability.[279] Unfortunately, the *Riverside Steel* court did not resolve several crucial issues generated by its decision: (1) the present value of the agreement; (2) how a court evaluates such a present value to determine if it is within the reasonable range of the settling party's fair share of the potential liability; and (3) whether, pursuant to Code of Civil Procedure section 877,[280] this present value would be deducted from any damage award rendered against the nonsettling defendant.[281] Because answers to

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278. *Id.* at 794, 217 Cal. Rptr. at 577 (emphasis in original).

279. *Id.* at 794-95, 217 Cal. Rptr. at 577.

280. CAL. CIV. PROC. CODE § 877 (West 1980). See *supra* notes 25-27 and accompanying text for a discussion of California Code of Civil Procedure § 877.

281. Another recent decision upholding sliding scale settlements not requiring a defined unconditional minimum contribution is Rogers & Wells v. Superior Court, 175 Cal. App. 3d 545, 220 Cal. Rptr. 767 (1985). In *Rogers & Wells*, the court cited with approval the analysis adopted in *Riverside Steel*, ignoring a minimum contribution requirement. *Id.* at 554, 220 Cal. Rptr. at 773. However, in its application of the reasonable range analysis, the *Rogers & Wells* court was consistent with the principles articulated in Tech-Bilt, Inc. v. Woodward-Clyde & Assocs., 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985). Initially, the court assessed the probability that the settling parties would be found liable at a trial. Estimating this probability to be very low, the court quoted the trial court's finding that the settling parties' liability was "as close to zero as you can get." *Rogers & Wells*, 175 Cal. App. 3d at 549, 220 Cal. Rptr. at 769. Considering these circumstances, a sliding scale settlement demanding any contribution from the settlors would appear to reasonably reflect their fair share of potential liability. As the *Rogers & Wells* court correctly noted, this settlement had a present monetary value derived from the requirement that the settling parties advance the plaintiffs a portion of the guarantee amount. Although this was to be repaid out of any judgment collected by the plaintiffs, the present use of the money was valuable to the plaintiffs, and the loss of the use of that money represented a contribution by the settling parties. Hence, this settlement appears to meet the good faith-reasonable range demands enunciated in *Tech-Bilt*.

A more significant issue raised in *Rogers & Wells* relates to burden of proof. As the court correctly noted, settlements presented to the court are presumed to be good faith settlements. The burden of illustrating that an agreement fails good faith standards falls upon the party challenging the agreement. CAL. CIV. PROC. CODE § 877.6 (West Supp. 1986). This concept

these crucial questions were not provided, it appears that *Riverside Steel* represents an improper application of the reasonable range analysis adopted by the supreme court in *Tech-Bilt*.

A more troubling, and even less clear decision is *Abbott Ford, Inc. v. Superior Court*.[282] To recap the facts in that case, a woman was seriously injured when a tire from an oncoming van crashed through her windshield. She and one of several defendants executed a sliding scale settlement which required no unconditional minimum contribution.[283]

Addressing the pivotal issue in dispute, apportionment of damages, the *Abbott* court began by stating that "ultimate disproportionate allocation in and of itself was not necessarily a mark of bad faith."[284] The court further reasoned that, under certain circumstances, a sliding scale

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is easily applied to straight settlements because there is a fixed settlement price which the nonsettling party can identify to illustrate that the value of the settlement does not reasonably reflect the settling party's fair share of liability. However, when a sliding scale settlement contains no defined unconditional minimum contribution, the issue becomes more complex. The *Rogers & Wells* court opined that it was incumbent upon the nonsettling parties to factually illustrate the value of the sliding scale agreement and, further, to demonstrate that this value was not within the reasonable range of the settling parties fair share of potential liability. *Rogers & Wells*, 175 Cal. App. 3d at 545, 220 Cal. Rptr. at 773-74.

Obvious analytical difficulties emanate from the court's analysis. In the *Rogers & Wells* case itself, the nonsettling parties asserted that because the agreement required no unconditional minimum contribution, it had no value and therefore could not be a good faith settlement. The court rejected this "simplistic" contention. It reasoned that, to carry their burden of proof, the parties challenging the good faith of a sliding scale settlement must assess the value of the agreement and illustrate that that value is not within the reasonable range of the settling parties' potential liability. *Id.* Since the nonsettling parties had not done so, they had not carried their burden of proof on the good faith issue.

As in *Riverside Steel*, the *Rogers & Wells* court never assessed the value of the sliding scale settlement. One must assume, then, that no deduction will be made from any judgment ultimately rendered against the nonsettling defendants. In effect, the court is saying that the agreement has no value. For, if it did, that value would be deducted from any judgment ultimately returned against the nonsettling parties pursuant to CAL. CIV. PROC. CODE § 877 (West 1980).

A better analysis in sliding scale cases would place the burden on the settling parties to demonstrate the value of the agreement. Since the agreement addresses the specific needs of the settlors, they are in a better position to judge its value. They also will be careful to accurately estimate the value because it will ultimately be deducted from their judgment against the nonsettlors. Once a value is determined, the burden should then shift to the nonsettling parties to show that this value does not reasonably reflect the settling parties' fair share of liability. California Code of Civil Procedure § 877.6 should be amended to reflect this proposal.

282. 172 Cal. App. 3d 675, 218 Cal. Rptr. 605, *hrg. granted*, 709 P.2d 1309, 221 Cal. Rptr. 140 (1985). See *supra* notes 123-38 discussing *Abbott*.

283. *See supra* notes 127-36 and accompanying text.

284. *Abbott*, 172 Cal. App. 3d at 684, 218 Cal. Rptr. at 611. The court cites *Tech-Bilt* for this proposition. *Id.* If by this the *Abbott* court means that a settlement may be within a tortfeasor's reasonable range, though grossly disproportionate to his fair share of liability, it would be a very strained and certainly improper reading of *Tech-Bilt*. *See Tech-Bilt*, 38 Cal. 3d at 499, 698 P.2d at 166, 213 Cal. Rptr. at 264.

agreement which required no minimum payment from a settling defendant is not inconsistent with the goal of equitable allocation of costs. Such circumstances, the court concluded, existed in this case. Abbott had offered to pay seventy percent of a settlement if all defendants would agree to settle. Their efforts to settle were rejected by the other defendants.[285] Additionally, the plaintiffs in this case were in great need of funds immediately. Therefore, the agreement would serve the practical interests of both parties.[286] Abbott would avoid exposure to further liability at trial and the plaintiffs would get desperately needed cash. However, nowhere in the opinion does the court explain whether or how the agreement is within the reasonable range of the settling defendant's fair share of potential liability as specifically mandated by *Tech-Bilt*.[287] Like the court in *Riverside Steel*, the *Abbott* court ignored this crucial issue. Although these courts claim to be following *Tech-Bilt*, they bypass critical steps necessary to properly employ the reasonable range test embraced by that decision.

Abbott also illustrates the inequity possible when sliding scale agreements require no minimum contribution. In initial settlement negotiations, Abbott offered to pay seventy percent of a settlement if a total settlement could be negotiated.[288] Abbott thus admitted responsibility for a large part of the plaintiff's injury. It is difficult to understand, then, how an agreement which might release Abbott from liability to the plaintiffs and its co-defendants without requiring any contribution from them toward a potential damage award serves the goal of equitable apportionment of loss. The validity of the agreement becomes even more dubious in light of the *Tech-Bilt* court's statement that "a prime value in encouraging settlement lies in 'remov[ing the case] from the judicial system, and this occurs only when *all* claims relating to the loss are settled.' "[289] The agreement approved in *Abbott* ignores both the goal of equitable apportionment of loss and that of encouraging total settlement. Yet *Tech-Bilt* stressed that these are precisely the two goals that should be served in

285. *Abbott*, 172 Cal. App. 3d at 679, 218 Cal. Rptr. at 608. The court conceded that Abbott faced great exposure to liability if the case went to trial. *Id.* at 684, 218 Cal. Rptr. at 611.

286. *Id.* at 684-85, 218 Cal. Rptr. at 611-12.

287. Without knowing this, it is impossible to determine the price of the settlement, i.e., the amount to deduct from any judgment rendered against the remaining defendants pursuant to CAL. CIV. PROC. CODE § 877 (West 1980).

288. A total settlement is a settlement between all the parties to the action. *Abbott*, 172 Cal. App. 3d at 679, 218 Cal. Rptr. at 608.

289. *Tech-Bilt*, 38 Cal. 3d at 500, 698 P.2d at 167, 213 Cal. Rptr. at 264 (quoting Roberts, *supra* note 39, at 888-89) (emphasis added by the court).

determining good faith.[290]

A better solution to Abbott's problem is to allow it to settle with the plaintiff for an amount reasonably related to its fair share of liability. This could be accomplished if Abbott agreed to contribute an amount to any judgment rendered against the remaining defendants which met the requirements of the reasonable range test. Abbott is rewarded because a reasonable range analysis permits a settling party to settle for less than they would be required to pay at trial. Moreover, it protects the nonsettling defendants from having to pay an amount grossly disproportionate to their fair share of liability.

VI. CONCLUSION

The California Supreme Court made clear in *Tech-Bilt, Inc. v. Woodward-Clyde & Associates*[291] that lower courts, in fashioning a reasonable range test, must consider two goals: equitable allocation of costs and encouraging settlement. The *Tech-Bilt* court also counseled against stressing either goal to the exclusion of the other. Settlements in multitortfeasor litigation which create the possibility of one defendant paying substantially more than his share of fault promote only partial settlement and ignore equitable apportionment.

The key to the good faith of sliding scale agreements rests in requiring the settling party to contribute at least a minimum amount that is within the reasonable range of his fair share of liability to a final judgment. In this way, the settling party and the plaintiff receive the benefits of settling while the nonsettling party is protected from shouldering a portion of the verdict grossly disproportionate to his degree of fault. In such an agreement both goals are balanced, but neither is ignored.

Michael McGuinness

290. *Id.* at 498-99, 698 P.2d at 166, 213 Cal. Rptr. at 263.
291. 38 Cal. 3d 488, 698 P.2d 159, 213 Cal. Rptr. 256 (1985).